Supreme Court, U.S.
FILED
JUN 13 2007
OFFICE OF THE CLERK

No. 061669

In the
Supreme Court of the United States

JEANETT AND GEORGE MARKWARDT, EVELYN RODRIGUEZ, LORI TUCEK, AND PAMELA DRASKOVICH,

Petitioners,

v.

CANNON & DUNPHY, S.C.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Robert G. Bernhoft
Counsel of Record
LAW OFFICES OF ROBERT G. BERNHOFT, S.C.
207 East Buffalo Street
Suite 600
Milwaukee, WI 53202
Tel: (414) 276-3333
Fax: (414) 276-2822
rgbernhoft@bernhoftlaw.com

Counsel for Petitioners

2007 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTIONS PRESENTED ON CERTIORARI

1. Whether Wisconsin's Attorney Lien Statute authorizing prejudgment attachment of a client's property to the extent of negating and nullifying any disposition of the client's property, without prior notice or a prior hearing, satisfies the Due Process Clause of the Fourteenth Amendment?

2. Whether Wisconsin's Attorney Lien Statute authorizing seizure and transfer of a client's property through foreclosure of the lien summary adjudication upon a motion filed in the client's underlying tort action with less than two weeks notice, without discovery, testimony, cross-examination or any evidentiary hearing, satisfies the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the courts below: Pamela Draskovich, Lori Tucek, Evelyn Rodriguez, Jeanett Markwardt, and Cannon & Dunphy.

TABLE OF CONTENTS

Questions Presented..... i

Parties to the Proceeding..... ii

Table of Contents..... iii

Table of Authorities..... v

Opinions Below..... 1

Jurisdiction..... 1

Constitutional and Statutory Provisions Involved..... 1

Statement of the Case..... 3

Argument for Granting the Writ..... 8

I. THE FOURTEENTH AMENDMENT DOES NOT ALLOW LIENS TO NEGATE & NULLIFY ANY DISPOSITION OF PROPERTY WITHOUT EITHER PRIOR JUDICIAL NOTICE OR A PRIOR HEARING..... 12

II. THE FOURTEENTH AMENDMENT REQUIRES MORE PROCESS THAN SUMMARY ENFORCEMENT AND FORECLOSURE OF ATTORNEYS' LIENS ON LESS THAN TWO WEEKS NOTICE WITHOUT DISCOVERY, EVIDENTIARY HEARINGS, LIVE TESTIMONY OR CROSS EXAMINATION BEFORE PROPERTY CAN BE PERMANENTLY SEIZED & TRANSFERRED..... 16

Conclusion..... 26

Appendix

Wisconsin Supreme Court
Denial of Petition for Review,
Dated March 16, 2007.....A.1-3

Court of Appeals Decision,
Dated September 12, 2006.....A.4-28

Trial Court's Summary Judgment Order
on C&D's claimed fees,
dated May 16, 2005.....A.29-30

Trial Court's Order
denying C&D's intervention,
dated June 14, 2005.....A.31

Trial Court's Summary Judgment Order
on C&D's claimed fees and costs,
dated September 20, 2005.....A.32-34

Trial Court's Summary Judgment Order
on C&D's claimed fees and costs,
dated June 29, 2005.....A.35-37

Trial Court's Summary Judgment Order
on C&D's claimed fees and costs,
dated April 28, 2005.....A.38-40

C&D's Separation Agreement,
dated April 8, 2004.....A.41-44

C&D's Employment Contract,
dated September 12, 2000.....A.45-54

TABLE OF AUTHORITIES

Cases

Allstate Ins. Co. v. Fioravanti,
299 A.2d 585, 588 (Pa. 1973).....22

Armstrong v. Manzo,
380 U.S. 545, 552, 85 S.Ct. 1187, 1191,
14 L.Ed.2d 62 (1965).....18

Boddie v. Connecticut,
401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)...9, 19

Boline v. Doty,
345 N.W.2d 285, 290 (Minn.Ct.App. 1984) 21, 22-23

C.O. v. M.M.,
815 N.E.2d 582, 590 (Mass. 2004) 20

Cleveland Bd. of Educ. V. Loudermill,
470 U.S. 532, 105 S.Ct. 1487,
84 L.Ed.2d 484 (1985) 9

Commissioner v. Banks,
125 S.Ct. 826 (2005) 15

Connecticut v. Doehr,
501 U.S. 1, 111 S.Ct. 2105 (1991). 9, 11, 12, 13, 14

First Bank of Marietta v. Roslovic & Partners, Inc.,
2004 WL 1172885 (Ohio App. 10 Dist. 2004).....21

Frazee v. Frazee,
660 P.2d 928, 931 (Idaho 1983). 17

Fuentes v. Shevin,
407 U.S. 67, 92 S.Ct. 1983,
32 L.Ed.2d 556 (1972).....*passim*

Gaughan v. Gaughan
450 N.W.2d 338, 343 (Minn.Ct.App. 1990). 21, 24-25

Goldberg v. Kelly,
397 U.S. 254, 90 S.Ct. 1011,
25 L.Ed.2d 287 (1970) 9, 18

Grannis v. Ordean,
234 U.S. 385, 294, 34 S.Ct. 779, 783,
58 L.Ed. 1363 (1914). 18

Harmon v. Harmon,
943 P.2d 599, 604 (Ok. 1997) 20

Hawkins v. Mapes-Reeves Const. Co.,
81 N.Y.S. 794 (N.Y.App. 1903). 24

In re Attorneys Fees in Kohl v. Zeitlin,
704 N.W.2d 586, 595 (Wis. App. 2005)
(Dykman, J., Dissenting). 24

In re Goldberg,
235 B.R. 476, 485 (Bkrtcy.D.Idaho 1999) 17, 20-21

In re Herndon,
596 A.2d 592, 595 (D.C. 1991) 19

James Minge & Associates v. Hanover Ins. Co.,
692 So.2d 728 (La. App. 4 Cir. 1997) 19

Jenkins v. McKeithen,
395 U.S. 411, 429, 89 S.Ct. 1843, 1853,
23 L.Ed.2d 404 (1969) 18

Johnson v. Riverside Hotel, Inc.,
399 F.Supp. 1138 (D. Fla. 1975) 14

Kerrigan, Estess, Rankin & McLeod v. State,
711 So.2d 1246, 1249 (Fla.App. 4 Dist. 1998). 23

Klim v. Jones,
315 F.Supp. 109, 122 (D.C. Cal. 1970).....14

Krein v. Nordstrom,
908 P.2d 889, 891 (Wash.App. Div. I. 1995) 17

Levine v. Levine,
884 A.2d 222, 229 (N.J.Super.A.D. 2005). 23

Locurto v. Giuliani,
447 F.3d 159, 171 (2nd Cir. 2006) 19

McClelland v. Andrus,
606 F.2d 1278, 1286 (D.C.Cir. 1979) 19

Mitchell v. W.T.Grant Co.,
416 U.S. 600, 94 S.Ct. 1895,
40 L.Ed.2d 406 (1974) 9

North Georgia Fishing, Inc. v. Di-Chem, Inc.,
419 U.S. 601, 95 S.Ct. 719,
42 L.Ed.2d 751 (1975) 9, 14, 15

P.S.C. Resources, Inc., v. NLRB,
576 F.2d 380, 386 (1st Cir. 1978) 19

People ex rel. Klaeren v. Village of Lisle,
781 N.E.2d 223, 235 (Ill. 2002) 20

Safeport, Inc. v. Equipment Roundup & Manufacturing, Inc.,
60 P.3d 1076 (Oreg. App. 2002) 24

Santee v. North,
574 P.2d 191, 193 (Kans. 1977). 21-22

Simler v. Conner,
83 S.Ct. 609 (1963) 24

Sims v. Day,
99 P.3d 964, 970 (Wyo. 2004). 20

Sniadach v. Family Finance Corp. of Bay View,
395 U.S. 337, 338, 89 S.Ct. 1820, 1821,
23 L.Ed.2d 349 (1969).....8, 9, 15, 16, 19

State ex rel. Reynolds v. Allman,
427 P.2d 886, 889 (N.M. 1967).....20

State ex rel. West Virginia Truck Stops v. McHugh,
233 S.E.2d 729 (West Virg. 1977) 24

Willner v. Committee on Character and Fitness,
373 U.S. 96, 106-107, 83 S.Ct. 1175, 1182,
10 L.Ed.2d 224 (1963).....18

Zinerman v. Burch,
494 U.S. 113, 110 s.Ct. 975,
108 L.Ed.2d 100 (1990) 9, 15

Constitutional and Statutory Provisions

28 U.S.C. §§ 1257.....1

Fourteenth Amendment.....1, 9, 11, 12, 16

Milwaukee Local Rule 364.....10

U.S. Const., Amendment IV.....1

Wis. Stat. § 757.36 (The Attorney Lien Statute) .....*passim*

Wis. Stat. §802.08(2) 11

Other Authorities

Walter, David D., THE UNCONSTITUTIONAL SEIZURE
OF VEHICLES: IOWA TOWING STATUTES
COLLIDE WITH THE FEDERAL CONSTITUTION,
73 Iowa l. Rev. 495, 501 (1988). 25

OPINIONS BELOW

The Wisconsin Supreme Court's Denial of Review is contained in the Appendix at A.1-3. The Opinion of the Wisconsin Court of Appeals for District I, issued September 12, 2006, is included in the Appendix at A.4-28. The Orders of the trial courts in the consolidated appeals are also included from A.29-40. The Appendix also includes the attorney employment contracts at issue from A.41-54, respectively.

JURISDICTION

The Wisconsin Supreme Court denied the petition for review on March 16, 2007. This Petition for Writ of Certiorari is filed within 90 days of the denial. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment IV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Wis. Stat. 757.36 (The Attorneys Lien Statute)

> Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any attorney to prosecute the action and give the attorney a lien upon the cause of action and

upon the proceeds or damages derived in any action brought for the enforcement of the cause of action, as security for fees in the conduct of the litigation; when such agreement is made and notice thereof given to the opposite party or his or her attorney, no settlement or adjustment of the action may be valid as against the lien so created, provided the agreement for fees is fair and reasonable. This section shall not be construed as changing the law in respect to champertous contracts. (Emphasis added)

STATEMENT OF THE CASE

This Court has never addressed the proper procedural due process limitations on attorneys' lien statutes common in the several states, including what procedural due process is necessary before the lien attaches and what procedural due process is necessary before the lien can be foreclosed and enforced. This case raises those precise questions, which are now subject to dispute amongst the several states. While most states do not allow summary proceedings to foreclose a lien, Wisconsin law does.

Four clients signed retainer contracts with a personal injury law firm, Cannon & Dunphy, in Brookfield, Wisconsin. (Pet.App.128-31)(A-App.106-9)(*Draskovich* R.63:18; *Tucek* R.23:9; *Markwardt* R.28:6; *Rodriguez* R.31:6),[1] These clients retained Cannon & Dunphy's firm after meeting with Attorney James Gende ("Gende"), while he was employed at Cannon & Dunphy. (*Draskovich* R.56:10) He was the only attorney the clients ever worked with at the firm. (Pet.App.132,139,149)(A-App.113,117,121)(*Markwardt* R.52:3; *Tucek* R.39:3; *Draskovich* R.51:3) After Gende left his employ at Cannon & Dunphy, these four clients terminated their contracts with Cannon & Dunphy. (*Draskovich* R.63:18; *Tucek* R.23:9; *Markwardt* R.28:6; *Rodriguez* R.31:6)

During his employment with Cannon & Dunphy, Gende signed two employment contracts. Both contracts claimed the clients' cause of action remained the property of Cannon & Dunphy even if the clients terminated Cannon & Dunphy's legal services. (A.41,52)(Pet.App.144,156)(A-App.121,135) Cannon & Dunphy's first employment contract

---

[1] The Petitioners cite the U.S. Supreme Court Petition for Writ of Certiorari Appendix as (A.), the Wisconsin Supreme Court Petition for Review Appendix as (Pet.App.), the Wisconsin Appellate Court Appendix as (A-App.), and to the trial court record with the clients' name and citation to the record.

provided Gende receive a contingent $27 per hour for post-termination work for any client that terminated Cannon & Dunphy. (A.47,52)(Pet.App.150,156)(A-App.128,134)

Cannon & Dunphy's second contract – the Separation Agreement – required the firm receive 80% of all fees generated by Gende after he left the firm for these clients that terminated Cannon & Dunphy. (A.41-2)(Pet.App.144)(A-App.121) That contract also provided that Gende could counter-claim for any moneys due him if Cannon & Dunphy initiated any legal action to enforce the contract against him. (A.43)(Pet.App.145)(A-App.122)

Cannon & Dunphy's Separation Agreement incorporated by reference the provisions of the Employment Contract:

> Employer agrees to modify paragraph 12 of the current employment agreement dated 9/12/00 in the following limited respects. All other terms not expressly modified shall remain in full force and effect.

(A.41)(Pet.App.144)(A-App.121).

One of those provisions incorporated into the Separation Agreement was Cannon & Dunphy's perpetual property interest in these clients' information and fees regardless of whether Cannon & Dunphy remained the clients' attorney or agent:

> All fees generated on such client cases assigned to the Employee are the property of the Corporation regardless of when the fees are generated or whether the Employee is still employed by the Corporation when the fees are generated...
>
> FILES, RECORDS AND CLIENTS. All files, records, and other information concerning

> clients of the Corporation shall belong to and remain the property of the Corporation...

(A.46, 51)(Pet. App. 148, 155)(A-App. 126, 133)(Emphasis added).

Cannon & Dunphy's Separation Agreement provided that if Gende violated any of the terms contained therein, then he would "be bound by the terms" of Cannon & Dunphy's employment contract. (A.42)(Pet.App.145)(A-App.122) This contract also required strict secrecy, prohibiting disclosure to the courts, these clients or other attorneys absent special order. (A.42-3)(Pet.App.145)(A-App.122)

After terminating Cannon & Dunphy, these clients retained Attorney Gende at his new firm and ultimately settled their personal injury claims. Due to the secrecy provision, these clients were not privy to, nor signed, Cannon & Dunphy's employment contracts with Gende. (Pet.App.133,137,141)(A-App.110,114,118) After the settlements, Cannon & Dunphy, a non-party to the clients' underlying tort claims, filed "motions to intervene and for attorneys fees", demanding summary enforcement and foreclosure of an attorneys' lien against the clients on less than two weeks notice to the clients. (*Markwardt* R.22:1; *Rodriguez* R.27:1; *Tucek* R.21:1; *Draskovich* R.55:1) Gende was not made a party to any of these actions, and Cannon & Dunphy objected to Gende's attempts to become a party via consolidation motions. (*Markwardt* R.114; *Rodriguez* R.38; *Tucek* R.36; *Draskovich* R.60) The trial courts denied all of Gende's motions to consolidate. (A.29-30, 36)(Pet.App. 167, 169)(A-App.145,147)

Cannon & Dunphy successfully argued the clients had no standing to dispute any fee contracts and that Cannon & Dunphy's employment contracts with Gende created an irreconcilable conflict of interest between Gende and his clients precluding Gende from challenging Cannon &

Dunphy's statutory lien. (*Markwardt* R.30:10, R.47:8-9; *Draskovich* R.56:10; *Tucek* R.22:10)[2]

The clients disputed the contracts, disputed the liens, and disputed the moneys demanded as due, raising issues of champertous contracts against public policy, inadequate performance, and discharge of the firm with no notice of a post-discharge lien. (*Markwardt* R.27,28,52; *Rodriguez* R.36; *Tucek* R.33,34; *Draskovich* R.48,49) Discovery and evidentiary hearings were requested for witnesses to testify and allow cross-examination of Cannon & Dunphy to prove these clients' defenses. (*Markwardt* R.50, R.125:17, R.126:16, R.68; *Rodriguez* R.36, R.59:16,34; *Tucek* R.34:12, R.57:16; *Draskovich* R.96, R.105:12)

The trial courts in Milwaukee County, Wisconsin, denied all of those requests and summarily enforced and foreclosed the lien, prohibiting any discovery, any cross examination or evidentiary hearing, on as little as thirteen day notice of the initial claim for fees. (A.29-40)(Pet.App.158-74)(A-App.138-52) The trial court determined no evidentiary hearing was necessary and awarded fees as a matter of law:

---

[2] Cannon & Dunphy specifically argued: "[A]n irreconcilable conflict of interest precludes any claim by Attorney Gende that Cannon & Dunphy, S.C.'s retainer agreement and liens are not enforceable. SCR 20:1.7, Conflict of Interest, provides that:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the la own interests.

Here, the conflict arises as Attorney Gende has contractually agreed that Cannon & Dunphy, S.C.'s liens are 'valid and binding' on Ms. Tucek. He cannot turn around and advise her or represent her in a challenge to the repayment of the firm's lien for fees and costs. This is a non-waivable, actual conflict of interest, which disqualifies Attorney Gende from such representation." (*Tucek* R.22:10)(Emphasis added)

> COUNSEL: ...[M]y client's not going to be given an evidentiary hearing because you are holding, as a matter of law, that all of the fees are Cannon & Dunphy's fees under the intervention action; do I understand that correctly?
>
> THE COURT: That's what I have ordered.

(*Rodriguez* R.59:45)(Emphasis added)

Another trial court determined the employment contracts created a modified lien, and this lien did not require prior notice, a prior hearing, or even the client's awareness of the contract itself, before attaching to the client's property (their cause of action):

> I don't think, there is any dispute that, that lien claim has been modified by an agreement of the original successor lawyers... That agreement modified [C&D's] lien and limits [C&D's] claim to eighty per cent of fees...
>
> [F]or the reasons that I have stated it's a valid lien and the fees are to be paid out in accordance with the eighty and twenty claims.

(*Markwardt* R.126:25-6, 28)

The Wisconsin Court of Appeals recognized the trial courts' entered summary judgment on behalf of Cannon & Dunphy, even though Cannon & Dunphy never noticed summary judgment motions, nor requested same. (A.10)(Pet.App.109). The Court of Appeals then affirmed the trial courts' entries of judgment as consistent with the State's Attorney Lien Statute, a statute that allows an attorney to attach property of another without judicial notice or a hearing and that allows summary proceedings to enforce the contract and foreclose the lien on as little as two weeks days notice without a formal complaint, any right to an

answer, any right to discovery, any right to present testimony in court, any right of cross-examination, or any evidentiary hearing or any trial.

The Court of Appeals held that Cannon & Dunphy's employment contracts with Gende modified Cannon & Dunphy's statutory lien against these clients that terminated the firm:

> In each case, the award of reasonable attorney fees and costs was consistent with a Retainer Contract signed by each client with Cannon & Dunphy, S.C., and was consistent with the Separation Agreement between Cannon & Dunphy, S.C. and James Gende, who became successor counsel when he ceased to be a Cannon & Dunphy, S.C. employee.
>
> The trial court [sic] applied the percentage allocation agreed to in the Separation Agreement to the Retainer Contract fees.

(A.6,24)(Pet.App.104,122)

ARGUMENT FOR GRANTING WRIT

When a simple worker challenged the garnishment methods in Wisconsin against her creditor, this Court took up the case and cause, and set right a bevy of precarious errors in state property seizure methods and remedies across the country. The court noted "summary procedures" and pre-notice attachments were patently inappropriate in all but "extraordinary situations." *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 338, 89 S.Ct. 1820, 1821, 23 L.Ed.2d 349 (1969).

In this case, these ordinary clients from Wisconsin challenge the same due process violation in a different, but equally critical context: Wis. Stat. §757.36, the attorney lien statute. These consolidated cases raise the same fundamental

issue, subject to conflicting decisions amongst the states below and substantial controversy: does the due process clause of the Fourteenth Amendment allow states to create an attorney's lien against the client's property without judicial notice or a judicial hearing, and then permit foreclosure of the attorney's lien on the client's property upon filing of merely a motion, providing less than two-week notice, with no right for the client to file an answer, seek discovery, command joinder of necessary parties, present live testimony in court, conduct cross examination of the creditor, or provide any form of evidentiary hearing or trial?

This issue impacts attorneys and clients across the country, has a collateral impact on the appropriateness of this Court's interpretation of federal tax laws, and governs an essential issue of due process in the area of state creditor remedies, a persistent concern to this court since 1969.

Whether a state can allow pre-judgment collection and summary forfeiture has been one of constant concern for this Court. *See e.g.*, *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 377, 89 S.Ct. 1820, 23 L.Ed. 349 (1969); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Mitchell v. W.T.Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *North Georgia Fishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Cleveland Bd. of Educ. V. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 484 (1985); *Zinerman v. Burch*, 494 U.S. 113, 110 s.Ct. 975, 108 L.Ed.2d 100 (1990); *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105 (1991).

This Court has always recognized the above cited decisions have the salutary and necessary effect of curing Constitutional errors across the country. *See Fuentes* at 71, n.3. ("summary prejudgment remedies have come under constitutional challenge throughout the country" because of

our prior precedents). Here, although none of the trial courts recognized they entered summary judgment and none of Cannon & Dunphy's motions "to intervene and for fees" requested summary judgment, the Wisconsin Court of Appeals recognized summary judgment was in fact entered:

> All of the trial judges awarded Cannon & Dunphy summary judgment which affirmed the validity of their liens, found costs and attorney fees reasonable, and ordered that costs advanced and Retainer Contract attorney fees be paid from the proceeds of the recovery consistent with the Separation Agreement. Each trial court declined to consider Gende's claims that the Employment Contract and the Separation Agreement were invalid, concluding either that they were irrelevant to the lien validity or that those issues were before another court. Gende appealed.

(A.10-11)(Pet.App.109)[3]

---

[3] Although Cannon & Dunphy filed their "motions to intervene and for fees" in compliance with local rules for non-summary judgment motions, these motions violated local court rules and Wisconsin Statutes relative to the timely notice and filing of summary judgment motions – the Wisconsin courts considered such civil rules inapplicable to its summary foreclosure of an attorneys' lien:

> Milwaukee Local Rule 364 provides: "A motion for summary judgment... **Prior to the service and filing, movant shall obtain from the deputy court clerk a hearing date set not less than thirty (30) days from the service and filing of the motion and supporting documents... A respondent shall have fifteen (15) days from the receipt of the movant's motion within which to serve and file an opposing brief or supporting documents."**

For the Wisconsin courts, the issue was as follows: first, under the Attorney Lien Statute, if a client signs a retainer contract, that contract creates an automatic lien against the client for the full amount of the fees under the contract and encumbers the client's right of settlement or judgment until the lien is satisfied, as the Statute legally nullifies any settlement without satisfaction of the lien – this attachment of the lien requires neither prior notice nor any prior hearing; and, second, an attorney, even if a non-party, need not file an independent action, but can file a simple motion under the local motion guidelines (which can require two-weeks notice or less), and summarily foreclose and enforce any asserted lien, seizing the property of the client without allowing the client any right of answer, any right of discovery, any right of testimony or any right of cross examination. The "hearing" can be, and was in every case over objection, a perfunctory, abbreviated motion hearing conducted without testimony or evidence.

This -- the absence of prior notice or hearing before attachment and the lack of an evidentiary hearing before foreclosure of the lien -- is precisely why the attorneys' lien statute, as authoritatively constructed and applied by Wisconsin courts, violated the procedural due process rights of these clients, rights secured under the Fourteenth Amendment to the United States Constitution. Where a state's practice deviates from the common practice of other states, such as the manner in which Wisconsin's Attorney Lien Statute is enforced, certiorari is warranted to insure only the correct practice common in other states continues while remedying the incorrect practice. *See Connecticut v. Doehr*, 501 U.S. 1, 18, 111 S.Ct. 2105, 2116 (1991).

Wis. Stat. §802.08(2) provides: Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing.

I. THE FOURTEENTH AMENDMENT DOES NOT ALLOW LIENS TO NEGATE & NULLIFY ANY DISPOSITION OF PROPERTY WITHOUT EITHER PRIOR JUDICIAL NOTICE OR A PRIOR HEARING.

The effect of Wisconsin's attorney lien statute is extraordinary: it nullifies any and all settlement and judgments obtained by the client regardless of client intent that does not protect the retainer of the attorney, without any requirement of prior notice or prior hearing. As the Wisconsin Court of Appeals held here, a discharged lawyer has such a lien even where the contract does not expressly provide for a post-discharge lien. It is this act of encumbering property without notice of a hearing, or, in this case, even knowledge of Cannon & Dunphy's employment contracts by these clients which cannot comport with the procedural due process requirements of the Due Process Clause. (*See* Client Affidavits Pet.App.133-4, 137-8, 141-2)(A-App.110-11, 114-5, 118-9)(*Markwardt* R.52:1-2; *Tucek* R.39:1-2; *Draskovich* R.51:1-2) This statute is more extreme than other prejudgment attachment statutes this Court previously held unconstitutional, as the statute legally nullifies any effort at disposition of the client's property if that disposition does not secure the lien, without any notice of hearing.

Attorneys' liens are designed to enable attorneys to "make use of state procedures with the overt, significant assistance of state officials," and such liens undoubtedly involve state action "substantial enough to implicate the Due Process Clause." *Doehr* at 11. "Without doubt, state procedures for creating and enforcing attachments, as with liens, are subject to the strictures of due process." *Doehr* at 12. Even "a temporary, nonfinal deprivation of property" such as the attachment of the lien to the property "is

nonetheless a deprivation in the terms of the Fourteenth Amendment." *Fuentes* at 85, 1996.

Determining what process must be afforded by a state statute enabling an individual to enlist the State's aid to deprive another of his or her property by means of a prejudgment attachment or similar procedure requires (1) consideration of the private interest that will be affected by the prejudgment measure; (2) an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and, (3) principal attention to the interest of the party seeking the prejudgment remedy, with due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections. *See Doehr* at 14.

The private interest of the client in controlling their property – here, the very right to even legally negotiate *any* disposition of the property – disfavors the prejudgment attachment without notice or a hearing. The risk of erroneous deprivation could not be higher; the lien can be established by the mere unilateral claim of the attorney, with no independent judicial review whatsoever prior to the lien attaching; and any interest in the government in the ethical practice of law and client rights is undermined by making attorneys the master, rather than the agent, of their client's disposition of the client's cause of action.

This Court has already found that prejudgment attachment to a property interest without prior notice violates the Fourteenth Amendment. *See Connecticut v. Doehr,* 501 U.S. 1, 111 S.Ct. 2105 (1991)(finding that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing violates the Due Process Clause). The same problem this court identified in *Doehr* exists here:

> Permitting a court to authorize attachment merely because the plaintiff believes the

> defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident and too great to satisfy the requirements of due process absent any countervailing consideration.

Doehr at 13-14.

Equally, akin to the garnishment and innkeeper lien statutes already invalidated, the absence of meaningful due process protections before an attorney can foreclose the lien renders the original attachment of the lien contrary to due process. "There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *Di-Chem* at 607 (striking down Georgia garnishment statute).

In *Fuentes*, this Court affirmed the logic of the California Supreme Court, where a sister federal court struck down a comparable lien against property under an innkeeper's statute. *Klim v. Jones*, 315 F.Supp. 109, 122 (D.C. Cal. 1970). As the court in *Klim* held, "the failure to provide for any sort of hearing prior to the imposition of the innkeeper's lien" deprived "the boarder of property without due process of law." *Id.* A federal district court across the country in Florida concurred. *See Johnson v. Riverside Hotel, Inc.*, 399 F.Supp. 1138 (D. Fla. 1975)(summary enforcement of innkeeper lien renders lien statute unconstitutional). There

is no reason to find an attorney's lien the kind of interest that fits such an "extraordinary situation," where a pre-attachment hearing would be impractical or impossible. *See Sniadach*; *see also Zinermon* at 128-129.

While a client must pay federal income taxes as if the client exclusively controls her cause of action, *Commissioner v. Banks*, 125 S.Ct. 826 (2005), the client here is denied that very control by the prejudgment attachment of the statutory lien to the cause of action, rendering any such exercise of such control illusory and a nullity (invalidating all settlements as a matter of law if attorney's lien not protected).

Attorneys' liens are no exception to due process. "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." *Di-Chem, Inc.* at 608. As Wisconsin does not require the latter, *see* Section II, the lien itself, without notice or hearing, is Constitutionally invalid:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a

person's right to enjoy what is his, free of governmental interference.

Fuentes at 80-81, 1994

The mere fact an attorney claims partial ownership equally does not defeat the due process protection, as the protection "has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest." *Fuentes* at 86, 1997. Nor are the principles and precepts limited to "a rivulet of wage garnishment" though the Wisconsin courts did just that here; rather, "*Sniadach* is constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court." *Fuentes* at 88, 1999 n.19.

A client whose disposal of their own cause of action is nullified by a lien that does not require either prior notice or prior hearing cannot comport with the procedural due process requirements of the Fourteenth Amendment, especially when that lien can be extended through employment contracts these clients never knew even existed. (A.42-3)(Pet.App. 145)(A-App. 122)(*Also see* Client Affidavits, pg. 12 *infra*)

II. THE FOURTEENTH AMENDMENT REQUIRES MORE PROCESS THAN SUMMARY ENFORCEMENT AND FORECLOSURE OF ATTORNEYS' LIENS ON LESS THAN TWO WEEKS NOTICE WITHOUT DISCOVERY, EVIDENTIARY HEARINGS, LIVE TESTIMONY OR CROSS EXAMINATION BEFORE PROPERTY CAN BE PERMANENTLY SEIZED & TRANSFERRED.

The Wisconsin Attorneys' Lien Statute provides no requirement for the lien to be foreclosed by an independent

legal action, no requirement to join necessary parties or follow the rules of civil procedure, and affords the client no entitlement to discovery, present testimony, perform cross-examination, or compel an evidentiary hearing. Similarly, issues of contract, traditionally requiring trials by jury, can be disposed of summarily without juries. All of this took place in each of the cases below and all of this lack of process offends the requirements of procedural due process.

Federal courts have noted the "need for due process in creation and enforcement of such attorneys' liens." *In re Goldberg*, 235 B.R. 476, 485 (Bkrtcy.D.Idaho 1999). Due process compels an "opportunity for [the client] to challenge the amount or propriety" of any lien claim before foreclosure of the lien. *Frazee v. Frazee*, 660 P.2d 928, 931 (Idaho 1983). Here, these clients disputed they were aware of any fee splitting arrangement and disputed Cannon & Dunphy's claimed costs. (Pet.App. 133-4; Pet.App. 137-8; Pet.App. 141-2)(A-App. 110-11; A-App. 118-9; A-App. 114-5)(*Markwardt* R.52:2-3; *Draskovich* R.51:2-3; *Tucek* R.3:2-3)

In most states, such a lien provision is only Constitutional to the degree the lien can be foreclosed with the right to a meaningful hearing, including the right to testimony, cross-examination, sufficient notice, and discovery where necessary. "An attorney's fee lien gives an attorney the power to encumber a client's property without notice or hearing." *Krein v. Nordstrom*, 908 P.2d 889, 891 (Wash.App. Div. I. 1995) Therefore, the method of foreclosure of the lien is critical to due process, where evidentiary hearings such as a half-day trial with live testimony and cross-examination can suffice. *Id.* Here, all evidentiary hearings were denied. (*Rodriguez* R.59:45; *Tucek* R.57:19-20; *Markwardt* R.44:2, R.55:1; *Draskovich* R.96:2, 4)

"In reviewing state action in this area" this Court will "look to substance, not to bare form, to determine whether

constitutional minimums have been honored." *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 106-107, 83 S.Ct. 1175, 1182, 10 L.Ed.2d 224 (1963). For more than a century the central meaning of procedural due process has been clear: "the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 294, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). This opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). The right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause. *See Jenkins v. McKeithen*, 395 U.S. 411, 429, 89 S.Ct. 1843, 1853, 23 L.Ed.2d 404 (1969). "We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins* at 428, 1852.

> We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative actions were under scrutiny.

Goldberg at 270. Here, the trial court eschewed any semblance of due process and denied an evidentiary hearing:

> COUNSEL: [M]y client's not going to be given an evidentiary hearing because you are holding, as a matter of law, that all of the fees are Cannon & Dunphy's fees under the intervention action; do I understand that correctly?

THE COURT: That's what I have ordered.

(*Rodriguez* R.59:45)

Yet, due process is tailored to insure "the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." *See Sniadach at* 343, 1823 (Harlan, J. concurring).

When deprivation of property is at issue, minimal due process requires the state afford a person both meaningful notice and a meaningful hearing, which included a meaningful opportunity to present a defense. *See Boddie v. Connecticut,* 401 U.S. 371, 377-78, 91 S.Ct. 780, 785-86, 28 L.Ed.2d 113 (1971). Courts thus routinely require, at a minimum, that necessary parties be properly named and joined to the action, or must be dismissed. *See James Minge & Associates v. Hanover Ins. Co.*, 692 So.2d 728 (La. App. 4 Cir. 1997)(requiring dismissal for failure to join necessary party where discharged law firm brought suit but failed to join successor attorney to the action.)

The next requirement is discovery when needed. "An opportunity to litigate is neither full nor fair when a litigant is denied discovery, available in the ordinary course, into matters going to the heart of his claim." *Locurto v. Giuliani*, 447 F.3d 159, 171 (2nd Cir. 2006); *see also McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C.Cir. 1979); *P.S.C. Resources, Inc., v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978); *In re Herndon*, 596 A.2d 592, 595 (D.C. 1991)(all recognizing appropriate circumstances where due process compels discovery). The complete absence of discovery rights in the attorney's lien statute, and the complete denial of it to each of these clients here, independently violated procedural due process rights. As the trial court below specifically held, "Plaintiff's request for an evidentiary hearing on the attorney fees and cost issue be, and is hereby, denied". (A.36)(Pet.App.167)(A-App.145)(Emphasis added)

(*Also see* A.29-40)(Pet.App. 158-74)(A-App. 138-52)

An evidentiary hearing is equally required in lien cases "to be a compliance with the requirements of due process." *State ex rel. Reynolds v. Allman*, 427 P.2d 886, 889 (N.M. 1967). It "would be a denial of due process not to afford interested parties the right to cross-examine adverse witnesses" because "cross-examination is the most efficacious test for the discovery of the truth." *People ex rel. Klaeren v. Village of Lisle*, 781 N.E.2d 223, 235 (Ill. 2002); *see also Harmon v. Harmon*, 943 P.2d 599, 604 (Ok. 1997)(a hearing is not meaningful without the right of cross-examination).

Oral argument on motions is no substitute:

> Due process requires that the defendant be given an opportunity to testify and present evidence... The fact that defense counsel was permitted to argue on behalf of his client does not substitute for the opportunity to present evidence through the testimony of witnesses, to cross-examine adverse witnesses, and to have the judge take this testimony and cross-examination into account in making his findings.

C.O. v. M.M., 815 N.E.2d 582, 590 (Mass. 2004)

"One of the basic elements of due process is the right of each party to be apprised of all the evidence upon which an issue is to be decided, with the right to examine, explain or rebut such evidence. And the right to hear and controvert all evidence upon which a factual adjudication is to be made includes the right to hear and cross-examine witnesses." *Sims v. Day*, 99 P.3d 964, 970 (Wyo. 2004).

Unfortunately, as a lower federal court noted in striking down an attorneys lien for state lien procedures that violated due process, such process is too rarely afforded. *See*

In re Goldberg. Minnesota has had to twice discipline its trial courts for failure to afford due process. *See Boline v. Doty*, 345 N.W.2d 285, 290 (Minn.Ct.App. 1984); *Gaughan v. Gaughan* 450 N.W.2d 338, 343 (Minn.Ct.App. 1990). Other courts have forewarned of this exact problem:

> Too-easy recourse to the remedy of a charging lien would also systematically deprive clients of the opportunity to place what is essentially a contractual dispute before the court as a conventionally postured civil action, with its attendant procedural safeguards and formalities. The availability of such a shortcut in favor of our own profession, exclusive of all others, should be, for a number of reasons, applied with considerable restraint.

First Bank of Marietta v. Roslovic & Partners, Inc., 2004 WL 1172885 (Ohio App. 10 Dist. 2004).

Sister state courts outside Wisconsin routinely require the same for attorneys' lien disputes:

> [The trial court] did not allow Gaughan the opportunity to cross-examine the attorneys. This is not fair litigation. Only through cross-examination of the Firm's attorneys can Gaughan challenge the accuracy and validity of the Firm's time sheets... To hold otherwise would permit attorneys to present their time sheets, billing statements, or other evidence to the trial court unchallenged, and then be awarded an attorneys' lien. Such a result does not comport with due process and fair play.

Gaughan at 343.

> [The] premature termination of the hearing before the appellant was permitted to cross-

> examine counsel for appellee and introduce what evidence he might have bearing on the reasonableness of the fee. The right to be heard is a matter of public consequence as well as private concern as advocacy in our system of jurisprudence is an effective aid in rendering justice. (Syl. 1.)...The right to examine and cross-examine witnesses testifying at any judicial or quasi-judicial hearing is an important requirement of due process.

Santee v. North, 574 P.2d 191, 193 (Kans. 1977).

> It is a commonplace that adjudicatory action cannot validly be taken by any tribunal, whether judicial or administrative, except upon a hearing, wherein each party shall have the opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf and to make argument.

Allstate Ins. Co. v. Fioravanti, 299 A.2d 585, 588 (Pa. 1973).

Here, where non-evidentiary hearings were held on two-weeks notice, without discovery or cross-examination, resulting in enforcement of an attorneys' lien, violated the due process clause:

> Applying these principles to this case, it is clear that the amount of the lien was not fairly litigated. At the time of the initial hearing when the trial court decided the amount of the lien, the appellants had received only two weeks notice to prepare for the hearing. The appellants did not have access to the files and papers generated in their behalf, even though the papers properly belonged to them and were

> needed to litigate their good-faith claim that the attorney's fees were excessive. Further, no equitable action was brought to enforce the lien. For these reasons, we reverse the trial court's judgment.

See Boline at 290.

These procedural methods of insuring a meaningful chance to be heard before property is taken – such as joinder, discovery, and an evidentiary hearing -- remains the standard for lien foreclosure and fee awards outside Wisconsin:

> [The] trial court denied Petitioners due process when it sua sponte ruled unenforceable the contingent fee contract on which those liens were based, without notice and an opportunity for the parties and counsel to be heard. Furthermore, we conclude that the parties to the contingent fee contract are entitled to an evidentiary hearing on novation, as well as on the excessive contingent fee issue, because there are issues of fact as to both.

Kerrigan, Estess, Rankin & McLeod v. State, 711 So.2d 1246, 1249 (Fla.App. 4 Dist. 1998).

> [T]his determination [of the fee claim] must be based on the evidence presented at a plenary hearing, rather than the court's findings on an application for an award of counsel fees against the opposing party in the underlying action, to which the attorney was not a party.

Levine v. Levine, 884 A.2d 222, 229 (N.J.Super.A.D. 2005).

Equally, where state law vests an individual with a right to a jury trial, allowing a lien statute to circumvent that

right offends due process. Sister state courts have held when a contract dispute is raised in a lien action, the parties are entitled to a jury trial on the contract issues. *See Safeport, Inc. v. Equipment Roundup & Manufacturing, Inc.*, 60 P.3d 1076 (Oreg. App. 2002); *State ex rel. West Virginia Truck Stops v. McHugh*, 233 S.E.2d 729 (West Virg. 1977); *Hawkins v. Mapes-Reeves Const. Co.*, 81 N.Y.S. 794 (N.Y.App. 1903). This court concurred, but this opinion was rejected in Wisconsin over dissent. *See Simler v. Conner*, 83 S.Ct. 609 (1963); *In re Attorneys Fees in Kohl v. Zeitlin*, 704 N.W.2d 586, 595 (Wis. App. 2005)(Dykman, J., Dissenting). As the United States Supreme Court ruled in a unanimous decision:

> The case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee retainer contract, a traditionally 'legal' action. The fact that the action is in form a declaratory judgment case should not obscure the essentially legal nature of the action. The questions involved are traditional common-law issues which can be and should have been submitted to a jury under appropriate instructions as petitioner requested. Accordingly, the courts below erred in denying petitioner the jury trial guaranteed him by the Seventh Amendment and the judgment is reversed.

Simler, supra.

This alone has been grounds to find a statute's application invalid where it deprived a person of an otherwise right to a trial by jury:

> Moreover, in this case the trial court granted judgment in the contract action in addition to

> enforcing the attorneys' lien. The contract case alone would not have been a summary proceeding, and Gaughan certainly would have been allowed to cross-examine the Firm's attorneys had this been a common law contract case

Gaughan v. Gaughan 450 N.W.2d 338, 343 (Minn.Ct.App. 1990).

Scholars voice continuing concern over misuse of lien statutes:

> In cases dating back over a century, the Court has consistently recognized that individuals are entitled to notice regarding the government's seizure of their property and that they have the right to be heard by an impartial decision maker concerning the deprivation. Prying beneath these notions, one discovers the ultimate principle underlying these procedures: the principle of fairness. Fairness requires that individuals should not only be given notice and an impartial hearing, but also that the government should afford notice and hearing in a significant manner and in a manner that offers individuals an opportunity to present their side of the story.

Walter, David D., THE UNCONSTITUTIONAL SEIZURE OF VEHICLES: IOWA TOWING STATUTES COLLIDE WITH THE FEDERAL CONSTITUTION, 73 Iowa l. Rev. 495, 501 (1988).

Wisconsin has now made it the law that no such process is due at all – no independent action, no joinder of necessary parties, no discovery, no testimony, no cross-examination, no evidentiary hearing, and no trial.

This Court long ago recognized how such injudicious

and intemperate remedies cannot comport with judicial due process:

> [T]he fair process of decision making that [the Due Process clause] guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights and no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Fuentes at 81, 1994.

CONCLUSION

Everyone is entitled to their "day in court," a concept embedded in to the American consciousness as essential to the "rule of law." This includes fundamental time-tested procedural methods of adversarial dispute resolution such as: the right to notice of the allegations against you framed in the form of a complaint, to which you get the time and the right to answer and set forth affirmative defenses; the right to engage in discovery where critical to acquire and marshal the facts that support your case; the right to present your live testimony to a neutral decision-maker; the right to cross-examine your accusers in open court; and the chance to have an evidentiary hearing. These individual clients here before this Court received none of those procedural protections. Minimal due process requires more.

Petition for Writ of Certiorari should be granted.

Dated: June 13, 2007

Robert G. Bernhoft
Counsel of Record
THE LAW OFFICES OF
ROBERT G. BERNHOFT, S.C.
207 East Buffalo Street
Suite 600
Milwaukee, WI 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
rgbernhoft@bernhoftlaw.com

Counsel for Petitioners

Office of the Clerk
Supreme Court of Wisconsin
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Telephone (608) 266-1880
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

March 16, 2007

To:

Hon. Christopher R. Foley
Milwaukee County Circuit Court Judge
10201 Watertown Plank Rd.
Milwaukee, WI 53226

Clare F. Fiorenza
Milwaukee County Circuit Court Judge
10201 Watertown Plank Rd.
Milwaukee, WI 53226

Michael Guolee
Milwaukee County Circuit Court Judge
10201 Watertown Plank Rd.
Milwaukee, WI 53226

John Barrett
Milwaukee County Clerk of Circuit Court
901 N. 9th Street
Room G-8
Milwaukee, WI 53233

(Additional addressees on Page Two)

You are hereby notified that the Court has entered the following order:

No. 2004AP3236 Markwardt v. Zurich American Ins. Co.
L.C.#2003CV8352

2005AP1292 Rodriguez v. Allstate Insurance Company
L.C.#2003CV3470

2005AP1856 Tucek v. State Farm Mut. Auto. Ins. Co.

L.C.#2004CV2876

2005AP1857 Markwardt v. Zurich American Ins. Co.
L.C.#2003CV8352

2005AP2543 Draskovich v. McCauley
L.C.#2004CV737

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiffs-appellants-petitioners, Jeanette Markwardt, George Markwardt, Evelyn Rodriguez, Lori A. Tucek, and Pamela D. Draskovich, and a motion to take judicial notice having been filed by plaintiffs-appellants-petitioners, and all considered by this court;

IT IS ORDERED the motion is denied.

IT IS FURTHER ORDERED that the petition for review is denied, with $50 costs.

Wilcox, J., did not participate.

No. 2004AP3236 Markwardt v. Zurich American Ins. Co.
L.C.#2003CV8352

2005AP1292 Rodriguez v. Allstate Insurance Company
L.C.#2003CV3470

2005AP1856 Tucek v. State Farm Mut. Auto. Ins. Co.
L.C.#2004CV2876

2005AP1857 Markwardt v. Zurich American Ins. Co.
L.C.#2003CV8352

2005AP2543 Draskovich v. McCauley
L.C.#2004CV737

Additional addressees:

Robert G. Bernhoft
Robert E. Barnes
Law Office of Robert G. Bernhoft, S.C.
207 E. Buffalo Street, Suite 600

Milwaukee, Wisconsin 53202

James J. Gende II
Attorney at Law
W229N2573 Duplainville Rd.
Waukesha, WI 53186-1096

Terry E. Johnson
Peterson, Johnson & Murray, S.C.
733 N. Van Buren Street, 6th Fl.
Milwaukee, WI 53202-4792

Thomas E. Goss, Jr.
Mueller, Goss & Possi, S.C.
744 N. 4th Street, #600
Milwaukee, WI 53203-2108

STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT I

Jeanett Markwardt and George Markwardt,
Plaintiffs-Appellants,

Tommy Thompson, Secretary of Department of Health &
Human Services, and Humana Insurance Company,
A Wisconsin Insurance Corporation,
Involuntary-Plaintiffs,

v.

Zurich American Insurance Company, a Foreign Insurance
Corporation, Nahop Partners, L.P., A Foreign Limited
Partnership, and Radisson Hotel Milwaukee Airport,
Defendants,

Cannon & Dunphy, S.C.,
Third Party-Intervenor-Respondent.

Evelyn Rodriguez,
Plaintiff-Appellant,

Motorola, Inc.,
Involuntary-Plaintiff,

v.

Allstate Insurance Company,
A Foreign Insurance Corporation, and Jennifer Nagode,
Defendants,

Cannon & Dunphy, S.C.,
Intervenor-Respondent.

Lori A. Tucek, Plaintiff-Appellant,
Managed Health Services, a Wisconsin Insurance Corporation,
and Travelers Property Casualty Insurance Company,
A Domestic Insurance Company,

Involuntary-Plaintiffs,

v.

State Farm Mutual Automobile Insurance Company, a Foreign Insurance Corporation, and Edna M. North,
Defendants,

v.

Cannon & Dunphy, S.C.,
Third Party-Intervenor-Respondent.

Pamela D. Draskovich,
Plaintiff-Appellant,
UnitedHealthCare of Wisconsin, Inc., A Wisconsin Corporation, and American Family Mutual Insurance Company, a Wisconsin Insurance Corporation,
Involuntary-Plaintiffs,

v.

Kristin R. McCauley and State Farm Mutual Automobile Insurance Company, A Foreign Insurance Corporation,
Defendants,

Cannon & Dunphy, S.C.,
Intervenor-Respondent.

Nos. 2004AP3236, 2005AP1292, 2005AP1856, 2005AP1857, 2005AP2543.

[Opinion Filed Sept. 12, 2006.]

APPEAL from the order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY,[1] Judge.

---

[1] This appeal is a consolidation of five cases. The Hon. Christopher R. Foley presided over *Markward v. Zurich American Ins. Co.*, 2003CV8352; the Hon. Michael D. Goulee presided over *Rodriguez v. Allstate Ins. Co.*, 2003CV3470 and *Tucek v. State Farm Mutual Automobile Ins. Co.*, 2004CV2876; and the Hon. Clare L. Fiorenza

Affirmed.

APPEAL from the order of the circuit court for Milwaukee County: MICHAEL D. GOULEE, Judge. *Affirmed.*

APPEAL from the order of the circuit court for Milwaukee County: MICHAEL D. GOULEE, Judge. *Affirmed.*

APPEAL from the order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

APPEAL from the order of the circuit court for Milwaukee County: CLARE L FIORENZA, Judge. *Affirmed.*

Before FINE, CURLEY and KESSLER, JJ.

¶ 1 KESSLER, J. Because each trial judge assigned to one of these cases properly determined that Cannon & Dunphy, S.C. had a valid attorney lien, and based on undisputed material facts determined that attorney fees and costs requested by Cannon & Dunphy, S.C. were reasonable, we affirm. In each case, the award of reasonable attorney fees and costs was consistent with a Retainer Contract signed by each client with Cannon & Dunphy, S.C., and was consistent with the Separation Agreement between Cannon & Dunphy, S.C. and James Gende, who became successor counsel when he ceased to be a Cannon & Dunphy, S.C. employee. Gende objected to all awards to Cannon & Dunphy, S.C., claiming that they did not sufficiently document the claimed costs, and claiming that the fee allocation to which he agreed in his Separation Agreement was unenforceable because the

---

presided over *Draskovich v. McCauley*, 2004CV737. Because all cases involve substantially identical relevant documents, and the same legal issues, the cases are treated collectively in this appeal unless otherwise specifically noted.

Separation Agreement was contrary to public policy. We disagree and therefore affirm.

Background

¶ 2 When Attorney James Gende ("Gende") was employed by Cannon & Dunphy, S.C. ("the firm" or "Cannon & Dunphy") in May 2000, he entered into an Employment Agreement with the firm. He agreed therein, among other things, that:

> all clients assigned to him are clients of the law firm of the Corporation and are not the clients of the Employee. All fees generated on such client cases assigned to the Employee are the property of the Corporation regardless of when the fees are generated, or whether the Employee is still employed by the Corporation when the fees are generated.

The Employment Agreement also contained provisions for allocation of client fees in the event Gende left the firm and the client elected to discharge the firm and retain Gende. Each of the plaintiffs named in this appeal signed a Retainer Contract in which they retained "Cannon & Dunphy, S.C.," not Gende, to handle specified personal injury claims. The Employment Agreement specified that, as to the firm clients who elected to retain Gende if he left the firm, costs advanced by the firm up to the date of his departure would be repaid by Gende, and Gende would receive fees from any recovery relating to those clients based on a defined hourly rate for work he performed after leaving the firm. Gende specifically agreed that the termination provisions in the Employment Agreement were "fair and equitable."

¶ 3 Approximately four years later, Gende and the firm negotiated a Separation Agreement which Gende signed

on April 8, 2004. In the Separation Agreement, Gende again agreed that the Employment Agreement "is fair and all of its terms are valid and binding" and he further agreed "not to initiate a challenge, in any forum, as to the validity of said agreement." In addition, Gende released Cannon & Dunphy "from any and all claims, actions, causes of action, contracts, lawsuits, demands, damages, injuries, costs, interest, judgment and compensation, whether known or unknown from the beginning of time to the date of execution of this agreement." Under this release provision of the Separation Agreement, Cannon & Dunphy agreed to not "initiate[ ] any cause of action against [Gende] in any forum" and if it did, Gende's release of Cannon & Dunphy in said paragraph would be "null and void."[2]

¶ 4 Under the terms of the Separation Agreement, Gende obtained more favorable terms than are contained in the Employment Agreement with respect to allocating fees from existing clients of the firm who retained him after he left. According to the Employment Agreement, Gende would be paid for work on Cannon & Dunphy former client cases on a formula of post-departure hours worked multiplied by Gende's hourly rate based on his salary at Cannon & Dunphy. Under the Separation Agreement, for all but one case, Gende would keep twenty percent of the fee recovered. As to one case venued in Illinois, he was to keep twenty-five percent of the fee. Instead of the Employment Agreement obligation of immediate repayment of costs advanced by Cannon & Dunphy, the Separation Agreement allowed Gende to delay reimbursement of those costs until the particular case was concluded.

---

[2] The effect of this clause appears to prevent Cannon & Dunphy from suing Gende personally to collect fees to which they are entitled, but does not prevent enforcement of lien rights against settlement proceeds.

¶ 5 The plaintiffs in this appeal all chose to follow Gende to his own law firm. We find no evidence that any client terminated the Retainer Contract with Cannon & Dunphy for cause. Gende did not honor his obligations under the Separation Agreement when he did not voluntarily pay Cannon & Dunphy their share of the fees or reimburse the costs they had advanced when the various cases were concluded. In all but one of these cases, the record shows that Cannon & Dunphy filed motions to intervene[3] and to assert its contractual attorney lien after the case had been settled and dismissed.

¶ 6 After ending his employment with Cannon & Dunphy, Gende twice sued the firm in Waukesha County. The first case (2004CV2587) was dismissed for failure to properly commence the action. A Decision and Order on April 26, 2006, dismissing the second case (2005CV1529) indicates that Gende sought a declaratory judgment that the Separation Agreement and the Employment Agreement are void as against public policy and unenforceable. The trial court granted Cannon & Dunphy's motion for summary judgment and dismissed the case. That case has been appealed, but is not presently before this court.

¶ 7 Also after leaving Cannon & Dunphy, Gende complained to the Office of Lawyer Regulation ("OLR") about the method Cannon & Dunphy used to calculate some costs charged to clients. His complaint to the OLR involved the same unit method of charging costs to clients that Gende alleged before the trial court invalidates each client's Retainer

[3] In each case, Gende objected to the intervention; in each case, the trial court permitted intervention. Gende does not pursue this issue on appeal.

Contract-and hence defeats the lien for fees.[4] The OLR disagreed and concluded:

> Judge Foley ruled that the fees asserted by Cannon & Dunphy S.C. are reasonable. We agree with Judge Foley's decision.

While all fees must be reasonable, the Supreme Court Rules do not include a mandate for an attorney to calculate for a client the per-unit actual cost of nominal, fair expenses prior to or upon termination of the representation. There is insufficient evidence to support an allegation of ethical misconduct.

Gende sought review of the initial OLR decision, and the Director of the OLR advised:

> I have determined that there is not a sufficient basis to proceed. I agree with Judge Foley that the costs charged in this matter are reasonable. The information you have provided is insufficient to support potential violations of Wisconsin Supreme Court Rules regarding communication as they relate to fees and costs.

¶ 8 All of the trial judges awarded Cannon & Dunphy summary judgment which affirmed the validity of their liens, found costs and attorney fees reasonable, and ordered that costs advanced and Retainer Contract attorney fees be paid

---

[4] Gende objected before the trial court, and apparently complained to the OLR, that Cannon & Dunphy charged: A flat fee of $ .25 per page for photocopying; $.25 per local telephone call, regardless of duration; $.35 per desktop fax sent; and $.16 per minute for long distance telephone call in addition to local call charge. However, the record reflects that Gende represented just such manner of charges when seeking court approval of minor settlements while employed by Cannon & Dunphy and that the courts approved such charges.

from the proceeds of the recovery consistent with the Separation Agreement.5 Each trial court declined to consider Gende's claims that the Employment Contract and the Separation Agreement were invalid, concluding either that they were irrelevant to the lien validity or that those issues were before another court. Gende appealed.

Standard of Review

¶ 9 "We review an order for summary judgment de novo, applying the same standards as the trial court." *Piaskoski & Assocs. v. Ricciardi,* 2004 WI App 152, ¶ 6, 275 Wis.2d 650, 686 N.W.2d 675. "Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* "We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute." *Id.* "Even if certain facts are in dispute, the dispute will not prevent the granting of summary judgment if the facts at issue are 'not material to the legal issue on which summary judgment is sought.'" *Id.* (citation omitted).

¶ 10 A court determines the reasonableness of attorney fees when allocating between original and successor counsel. *Herro, McAndrews & Porter, S.C. v. Gerhardt,* 62 Wis.2d 179, 182, 214 N.W.2d 401 (1974), *overruled on other grounds by Standard Theatres, Inc. v. DOT,* 118 Wis.2d 730, 747, 349 N.W.2d 661 (1984) ("[C]ourts have the inherent power to determine the reasonableness of attorney's fees."). A fee dispute between original counsel and successor counsel may properly be resolved on summary judgment. *Piaskoski,*

---

[5] Gende admits that he has retained twenty percent of all fees on these cases, which is a benefit he obtained in the Separation Agreement. His subsequent challenge to the validity of the very agreement from which he benefited suggests, at a minimum, a certain disingenuousness.

275 Wis.2d 650, ¶¶ 6-11, 686 N.W.2d 675. Original counsel and successor counsel may enter into a binding contract dividing contingency fees in specific cases. *Id.*, ¶¶ 5, 10. An appellate court will uphold a trial court's finding of reasonable attorney fees absent a finding that the trial court abused its discretion. *Standard Theatres, Inc.*, 118 Wis.2d at 747, 349 N.W.2d 661 ("[W]e hold that the proper standard upon review of attorney fees is that the trial court's determination of the value of these fees will be sustained unless there is an abuse of discretion."). We review the validity of the lien *de novo*. *Herro*, 62 Wis.2d at 183, 214 N.W.2d 401.

I. Validity of lien

A. Establishing an attorney lien for fees

¶ 11 Wisconsin does not recognize a common law attorney lien for fees before judgment, in the absence of a written contract. *See Weigel v. Grimmett*, 173 Wis.2d 263, 267-68, 496 N.W.2d 206 (Ct.App.1992) (discussing *Courtney v. McGavock*, 23 Wis. 619, 621-23 (1869)). In Wisconsin, by statute, an attorney lien before judgment can only be created by contract. Wisconsin Stat. § 757.36 provides:

> Lien on proceeds of action to enforce cause of action. Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, *may contract with any attorney* to prosecute the action *and give the attorney a lien upon the cause of action and upon the proceeds or damages* derived in any action brought for the enforcement of the cause of action, *as security for fees in the conduct of the litigation*; when such agreement is made and notice thereof given to the opposite party or his or her attorney, no settlement or adjustment of the action may be valid as against the lien so created, provided

the agreement for fees is fair and reasonable. This section shall not be construed as changing the law in respect to champertous contracts.

(Emphasis added.) *See Knoll v. Klatt,* 43 Wis.2d 265, 168 N.W.2d 555 (1969), *overruled on other grounds by Herro,* 62 Wis.2d 179, 214 N.W.2d 401 (1974); *Tonn v. Reuter,* 6 Wis.2d 498, 95 N.W.2d 261 (1959).

¶ 12 The Retainer Contract[6] FN6 in each of these cases is identical except for the name of the client, the date of the incident giving rise to the representation, and the date signed by the client and the representative of Cannon & Dunphy. It provides in relevant part:

CANNON & DUNPHY, S.C.
RETAINER CONTRACT

[Client] ... in consideration of the services agreed to be rendered and furnished do hereby *employ CANNON & DUNPHY, S.C. as my attorneys* to, with my consent, settle my claim or bring suit thereon for damages and out of the proceeds of said settlement, judgment, monies, etc. agree to give them one third (1/3) thereof as their compensation, and in the meantime, *I give them a valid lien in said amount pursuant to sec. 757.36, Wis. Stats....* Additionally, CANNON & DUNPHY, S.C. hereby agrees to advance reasonable and necessary costs, expenses and disbursements for the prosecution of my claim which I will repay in addition to the legal fees. I understand that there will be no charge for services nor reimbursement for costs, expenses or disbursements advanced unless there is a recovery on my claim.

---

[6] It is undisputed that each of the plaintiffs in this appeal signed a Retainer Contract containing this language.

I have been advised that services could be rendered on an hourly basis, but I hereby elect to be bound by the contingent fee contract.

....

In the event CANNON & DUNPHY, S.C. withdraw as my attorneys after I have received a settlement offer which I reject, then I give them a valid lien in the amount of the settlement offer on the date of withdrawal or such lower amount as may be required by the Code of Professional Responsibility.

....

CANNON & DUNPHY, S.C.

By:
Attorney

(Client signature line omitted; capitalization as in original; emphasis added.)

B. The attorney liens at issue

¶ 13 Gende, in arguing that Cannon & Dunphy had no valid lien on the attorney fees earned as a result of the clients signing the Retainer Contracts, advances three theories. First, Gende objects to any award of fees or costs to Cannon & Dunphy, arguing that he is not successor counsel. Gende argues that the Retainer Contract did not create a lien for Cannon & Dunphy because the plaintiffs were never clients of Cannon & Dunphy, but were instead his clients. Alternatively, Gende argues that the Retainer Contract was invalid because the method of calculating costs charged to the client was unethical. Finally, Gende argues that the Employment Contract and the Separation Agreement are void

as against public policy, thus creating no obligation on his part to return fees from these cases to Cannon & Dunphy. We address these arguments separately.

1. Successor Counsel

¶ 14 Gende asserts that he, not Cannon & Dunphy, was personally retained in the initial Retainer Contract. The facts unequivocally establish the contrary. As can be seen from the language of the Retainer Contract, Gende signed specifically on behalf of Cannon & Dunphy. The Retainer Contract repeatedly refers to the client employing Cannon & Dunphy, not Gende. The Retainer Contract obligates Cannon & Dunphy, not Gende, to perform services and advance costs. The Retainer Contract allows Cannon & Dunphy, not Gende, to withdraw under certain circumstances. Under the Retainer Contract, the client promises to pay Cannon & Dunphy, not Gende, one-third of any recovery and gives Cannon & Dunphy, not Gende, a lien for those attorney fees. As Judge Guolee aptly observed in response to Gende's claim that he, not Cannon & Dunphy, had always been the client's lawyer:

> An employee associate lawyer does not have a right to hijack the employer or the firm's rights and treasury when they leave a firm. That's basically what we have here.... [I]t would be like an employee ... saying ... I am going to take this television and this computer, and I am going to ... just leave with them. And I am going to take some of the money that this firm ... has accumulated and leave. And then say ["Y]ou fight me for it.["][7] FN7

---

[7] Gende, in his brief and reply brief, argues that these statements, and even the fee agreements between original and successor counsel, reduce clients to the level of "chattel." This is a mischaracterization of the facts in the record. The record indicates that, at all times, the clients had the ability to retain whatever counsel that they wished. The clients chose

As can be seen from the express language of the Retainer Contract, Cannon & Dunphy was the original retained counsel.

¶ 15 A client may freely change attorneys. However, as our supreme court long ago explained, terminating a contract with an attorney without cause is a breach of contract by the client. *Tonn,* 6 Wis.2d at 503, 95 N.W.2d 261. "[W]here the attorney has been employed to perform specific legal services, his discharge, without cause or fault on his part before he has fully performed the work he was employed to do, constitutes a breach of his contract of employment and makes the client liable to respond in damages." *Id.* Damages to the attorney for breach by the client of the contingent-fee employment contract are the contingent fee based on the amount actually realized, less a fair allowance for the time and expenses the discharged attorney would have had to expend in performing the balance of the contract. *Id.* at 505, 95 N.W.2d 261. If there is not good cause for the discharge, any contractual attorney lien rights survive the discharge. *See id.* at 503, 95 N.W.2d 261; *see also Freyer v. Mutual Benefit Health & Accident Ass'n,* 45 Wis.2d 106, 107, 172 N.W.2d 338 (1969) (recognizing a valid contractual lien for a discharged former attorney); *cf. McBride v. Wausau Ins. Cos.,* 176 Wis.2d 382, 388, 500 N.W.2d 387 (Ct.App.1993) (refusing to enforce lien of discharged attorney whose "standard of conduct is below that required of attorneys as a

---

to retain Cannon & Dunphy and voluntarily signed the Retainer Contracts. At the time of Gende's departure from Cannon & Dunphy, the clients then had the choice to remain with Cannon & Dunphy, to retain Gende or to retain another attorney. The clients in this case chose to retain Gende. The clients' free and intelligent choice to retain whatever counsel they desire, however, does not abrogate their contractual rights and responsibilities under their original Retainer Contracts with Cannon & Dunphy. *See Tonn v. Reuter,* 6 Wis.2d 498, 503, 95 N.W.2d 261 (1959).

matter of law"). However, "[a] contingent-fee contract is always subject to the supervision of the court as to its reasonableness." *Tonn,* 6 Wis.2d at 504, 95 N.W.2d 261.

¶ 16 We find no evidence in the record that any of these plaintiffs discharged Cannon & Dunphy for cause. Nor has there been any challenge to the reasonableness of the one-third contingency-fee contract. Consequently, the original counsel, Cannon & Dunphy, is entitled to assert its rights to fees under the Retainer Contract. The Retainer Contract specifically grants Cannon & Dunphy an attorney lien to protect those fees. The Retainer Contract makes additional lien provisions should Cannon & Dunphy withdraw, and contains no language which abrogates the existing law that the lien remains in effect should the client discharge the firm without cause. We conclude, as did the trial courts, that Cannon & Dunphy may properly assert its lien, based on the Retainer Contract, to protect its right to attorney fees.[8]

2. Calculation of Costs

¶ 17 Gende claimed some of the costs charged under the Retainer Contract were unethical and thus invalidated the Retainer Contract and the resulting lien. Gende did not challenge all of the costs. His complaint centered only on the fixed unit charges for telephone, desktop fax, and photocopying. The trial court found that the costs charged were reasonable. Judge Foley, in a letter decision on the matter, observed:

[I]t boarders [sic] on the unimaginable that [costs] of

---

[8] Indeed, because the Separation Agreement contains a clause invalidating the release provision of the agreement if Cannon & Dunphy sue Gende in any forum, it appears that the only remedy they have for Gende's obvious breach of the Separation Agreement is to assert the very lien to which he now objects.

> $206.13 incurred in ten months representation in a significant personal injury action that ultimately resulted in a $87,500.00 settlement could be deemed unreasonable. On those facts alone, I would conclude they are reasonable. However, since it is Mr. Gende's position that an item-by-item analysis is necessary, I offer the following.
>
> Photocopy charges of .25, which incorporate bate stamping, bar coding, labeling and folio costs are reasonable, particularly noting that copy costs charged by medical providers in this case for photocopying ranged from $1.10 to .45 and that HFS 117.05 permits charges at or above the level charged by Cannon & Dunphy for photocopying.
>
> I am taking judicial notice of the fact that phone calls made from public pay phones now cost .50. On that basis I determine that the Cannon & Dunphy S.C.'s charge of .25 is reasonable. I reach the same conclusion as to their desktop faxing charge of .35.

¶ 18 We agree with Judge Foley's analysis. For the same reasons, we conclude that the method of calculating costs was reasonable.

¶ 19 We also independently conclude that in relation to the total recovery in each case, the costs requested by Cannon & Dunphy[9] FN9 are reasonable. We come to this conclusion based on the following undisputed facts relevant to each case.

¶ 20 *Markwardt v. Zurich American Insurance Co.* (Case no. 2003CV8352) was filed September 18, 2003, and

---

[9] These costs do not include payments to third-party vendors, expert witnesses and the like. Gende has not disputed those costs.

settled September 21, 2004. The total settlement was $87,500. Cannon & Dunphy costs disputed were $277.73, or 0.32% of the recovery. The fee to Cannon & Dunphy, under the Retainer Contract as reduced by the Separation Agreement, was $23,100.

¶ 21 *Rodriguez v. Allstate Insurance Co.* (Case no. 2003CV3470) was filed April 15, 2003, and settled January 25, 2005. The total settlement was $25,000. Cannon & Dunphy costs disputed were $291.42, or 1.17% of the recovery. The fee to Cannon & Dunphy, under the Retainer Contract as reduced by the Separation Agreement, was $6,600.

¶ 22 *Draskovich v. State Farm Mutual Automobile Insurance Co.* (Case no. 2004CV737) was filed January 23, 2004, and settled February 15, 2005. The total settlement was $45,000. Cannon & Dunphy costs disputed were $389.58, or 0.87% of the recovery. The fee to Cannon & Dunphy, under the Retainer Contract as reduced by the Separation Agreement, was $11,880.

¶ 23 *Tucek v. State Farm Mutual Automobile Insurance Co.* (Case no. 2004CV2876) was filed March 29, 2004, and settled May 19, 2005. The total settlement was $46,750. Cannon & Dunphy costs disputed were $175.96, or 0.4% of the recovery. The fee to Cannon & Dunphy, under the Retainer Contract as reduced by the Separation Agreement, was $12,342.

¶ 24 It is also undisputed that Cannon & Dunphy took a financial risk when it advanced substantial expenses for third-party providers, including in the *Tucek* case which was filed only a week before Gende signed the Separation Agreement, and when it agreed to delay recovery of those costs until the conclusion of each particular case. Based on

the records, we conclude that the costs claimed by Cannon & Dunphy are reasonable.

3. Impact of Employment Agreement and Separation Agreement on lien[10]

¶ 25 Gende argues that both the Employment Agreement and the Separation Agreement are contrary to public policy, and thus unenforceable. He made different arguments as to each of the documents. First, Gende argues that the Employment Agreement violates public policy because the terms of his employment were not disclosed to the client. He cites no authority for that proposition and we fail to see any logical reason why, generally, an associate attorney's employment contract with his or her employer should, as a matter of professional responsibility, be disclosed to a client of the firm. Nor do we see how that assertion is relevant to the attorney lien established in the Retainer Contract. Accordingly, on the facts of this case, we reject this argument.

¶ 26 Next, Gende argues that these clients were damaged by not being given notice of the Separation Agreement. This assertion is not supported by any evidence. The record does not indicate that any client paid more because Gende and Cannon & Dunphy agreed upon a formula for

---

[10] We observe that in the fact statement portion of his brief, Gende repeatedly "spins" the facts and editorializes in his description of the facts. For example, he repeatedly refers to the Employment Agreement and the Separation Agreement as "secret" agreements, apparently because, as is common with employment contracts and settlement agreements, the parties agreed they would be confidential. We remind litigants that editorial comment and argument interspersed in what Wis. Stat. Rule 809.19(1)(d) and (e) requires, namely an objective and completely accurate recitation of the facts, is inappropriate. *See Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶ 5 n.2, 281 Wis.2d 173, 696 N.W.2d 194.

dividing the fee. Rather, under the terms of the Separation Agreement, a method was developed and agreed to, by the original and successor counsel, whereby fees would be divided on an agreed-upon percentage so that no attorney time or expenses would need to be incurred to determine the percentage fee split for each individual transferred matter. Accordingly, on the facts of this case, we also reject this argument.

¶ 27 The trial court declined to consider these issues. We conclude that the validity of those agreements is irrelevant to the only defense Gende raised to the lien, namely the challenge to the costs. Having already explained our resolution of the costs allegation, we decline to pursue it further. Accordingly, based on the foregoing, we conclude that the attorney liens held by Cannon & Dunphy in these cases are valid.

II. Reasonableness of the attorney fees

¶ 28 We have previously concluded that when an attorney ends employment with a law firm, the firm and the departing attorney may enter into a separation agreement that allocates between them the fees to be earned on contingent-fee cases which the departing attorney retains after the conclusion of employment. *Piaskoski,* 275 Wis.2d 650, ¶ 25, 686 N.W.2d 675. The law firm, and the departing attorney, do not violate public policy by contracting for a method to allocate between them fees on cases that have not been completed. *See id.,* ¶¶ 1, 5, 20. Where "both parties compromised any potential claims to more than [the agreed percentage of the specific client's] fee, providing consideration for their contract to divide the fee [as agreed]," this court has enforced a fifty percent agreed upon division between the firm and departing counsel. *Id.,* ¶ 17. An agreed percentage allocation between the original and successor

counsel, which does not increase the fee due from the client, must still produce a reasonable fee, as applied to the group of cases subject to the agreement. *See Meyer v. Michigan Mut. Ins. Co.*, 2000 WI App 53, ¶ 13 n.4, 233 Wis.2d 493, 609 N.W.2d 167 ("A lawyer's fee shall be reasonable."); *State v. Cannon,* 199 Wis. 401, 409, 226 N.W. 385 (1929) (holding that recovery of fees under contingency agreements must be fair and reasonable). The reasonableness of the fees under this allocation of the fees between original counsel and successor counsel is subject to control by the court. *See Herro,* 62 Wis.2d at 183, 214 N.W.2d 401; *Tonn,* 6 Wis.2d at 504, 95 N.W.2d 261. We note that courts have found one-third contingency fees to be reasonable. *Klabacka v. Schott,* 23 Wis.2d 213, 218, 127 N.W.2d 19 (1964) (finding that a court does not abuse its discretion in upholding a one-third contingency fee contract); *cf. Kluenker v. DOT,* 109 Wis.2d 602, 608, 327 N.W.2d 145 (Ct.App.1982) (finding a forty percent contingency fee agreement reasonable). The trial courts did not abuse their discretion in finding that the one-third contingency fees were reasonable.

¶ 29 Both the Employment Agreement and the Separation Agreement are contracts. Our goal in contract interpretation is to determine and give effect to the parties' intentions. *Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 2000 WI 26, ¶ 23, 233 Wis.2d 314, 607 N.W.2d 276. "When the language of a contract is unambiguous, we apply its literal meaning." *Id.* Public policy favors freedom of contract. *See Gulmire v. St. Paul Fire & Marine Ins. Co.*, 2004 WI App 18, ¶ 18, 269 Wis.2d 501, 674 N.W.2d 629.

¶ 30 We consider the Employment Agreement only insofar as it deals with post-employment fee allocation.[11]

---

[11] Gende complains that the Employment Agreement restrictions on hiring staff from Cannon & Dunphy or employing experts or other

Wisconsin has long accepted that a portion of a contract may be severable, despite the fact that other portions may be illegal. *Schara v. Thiede,* 58 Wis.2d 489, 495, 206 N.W.2d 129 (1973). We express no opinion on the validity of other portions of the Employment Contract because they are unnecessary to our decision here. *State v. Castillo,* 213 Wis.2d 488, 492, 570 N.W.2d 44 (1997) (noting that an appellate court should decide cases on the narrowest possible grounds). Gende negotiated a substantial change to his benefit in these terms in the Separation Agreement. (See discussion, *supra,* ¶ 4.) Consequently, the validity of the Employment Agreement terms which are no longer in effect is moot. *State ex rel. Olson v. Litscher,* 2000 WI App 61, ¶ 3, 233 Wis.2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."); *see also Warren v. Link Farms, Inc.*, 123 Wis.2d 485, 487, 368 N.W.2d 688 (Ct.App.1985). A moot question is one which circumstances have rendered purely academic. Generally, moot issues will not be considered on appeal. *Warren,* 123 Wis.2d at 487, 368 N.W.2d 688. Accordingly, because the fee allocation formula at issue was not that contracted to in the Employment Agreement, but rather is the formula contracted to in the Separation Agreement, we will not consider any further the Employment Agreement fee allocation provisions.

¶ 31 As to the fee allocation formula contained in the

---

independent contractors he used while in their employ are against public policy. However, none of those provisions have anything to do with the fee allocation obligation in the Employment Agreement or its modification in the Separation Agreement. Indeed, Gende has not even alleged that he wished to hire a person from the Cannon & Dunphy staff or that he suffered any difficulty because of the expert witness restriction. We decline to consider issues which are not necessary to the case before us. *See Gross v. Hoffman,* 227 Wis. 296, 300, 277 N.W. 663 (1938) (noting that only dispositive issue need be addressed).

Separation Agreement, Gende does not argue that his Separation Agreement with Cannon & Dunphy resulted in higher fees to the client than were set forth in the Retainer Contract. The record also confirms that each client was only charged the one-third contingency fee. Nor does Gende argue that the one-third contingency fee is unreasonable.[12] As noted above, the undisputed facts demonstrate the differences among the cases in the time between the beginning of the action and settlement of each case. (*See* discussion, *supra,* ¶¶ 19-23.) The undisputed facts also demonstrate the differences in the time during which work was done by Cannon & Dunphy and work was done individually by Gende. (*See id.*) By entering into the Separation Agreement, Cannon & Dunphy and Gende, as original counsel and successor counsel, respectively, sought to save the time and expense that would be required to litigate the exact division of each fee at the conclusion of each case. This savings was consideration for each party agreeing to a set percentage allocation to be applied to all cases. We find nothing inherently unreasonable in such an agreement.

¶ 32 The trial court applied the percentage allocation agreed to in the Separation Agreement to the Retainer Contract fees. Based upon the undisputed facts in the records, we independently conclude that the fees awarded to Cannon & Dunphy were reasonable in these cases.

¶ 33 For all of the foregoing reasons, we affirm the orders enforcing Cannon & Dunphy's liens and the allocation of costs and fees consistent with the terms of the Separation Agreement. Costs awarded to respondent.

By the Court. – Orders affirmed.

---

[12] As noted above, courts have found one-third contingency fees are reasonable. *See, e.g., Klabacka v. Schott,* 23 Wis.2d 213, 218, 127 N.W.2d 19 (1964).

Recommended for publication in the official reports.

¶ 34 FINE, J. (*dissenting*). The core issue presented by this appeal is whether Cannon & Dunphy, S.C., has an enforceable lien in each of the cases. I respectfully submit that it does not.

¶ 35 Unless a client recovers a judgment on his or her tort claim, and, accordingly, the lawyer has an equitable lien for fees, *Wurtzinger v. Jacobs,* 33 Wis.2d 703, 712, 148 N.W.2d 86, 91 (1967), an attorney's lien for fees must be granted by contract with the client in order to be enforceable, *Weigel v. Grimmett,* 173 Wis.2d 263, 267-271, 496 N.W.2d 206, 208-210 (Ct.App.1992). The Majority recognizes this when it writes: "Wisconsin does not recognize a common law attorney lien for fees before judgment, in the absence of a written contract." Majority, ¶ 11. As the Majority also recognizes, Wis. Stat. § 757.36 permits the client to give his or her lawyer a fee-lien by contract. It provides:

> Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any attorney to prosecute the action and give the attorney a lien upon the cause of action and upon the proceeds or damages derived in any action brought for the enforcement of the cause of action, as security for fees in the conduct of the litigation; when such agreement is made and notice thereof given to the opposite party or his or her attorney, no settlement or adjustment of the action may be valid as against the lien so created, provided the agreement for fees is fair and reasonable. This section shall not be construed as changing the law in respect to champertous contracts.

The extent of the agreed-to lien is controlled by the lien

contract between the client and the lawyer. *See McBride v. Wausau Ins. Cos.*, 176 Wis.2d 382, 391, 500 N.W.2d 387, 390 (Ct.App.1993). Neither Cannon & Dunphy nor the Majority contends that the firm has an equitable lien on the settlements in these cases. Rather, they focus on Cannon & Dunphy's retention/lien-agreements with the firm's former clients. In my view, the lien agreements do not give Cannon & Dunphy liens on the settlement proceeds.

¶ 36 As the Majority notes, the lien agreements in these cases are identical. They provide:

> [Client] having sustained personal injuries on or about [date], through the negligence and carelessness of all responsible parties and in consideration of the services agreed to be rendered and furnished do hereby employ CANNON & DUNPHY, S.C. as my attorneys to, with my consent, settle my claim or bring suit thereon for damages and out of the proceeds of said settlement, judgment, monies, etc. agree to give them one third (1/3) thereof as their compensation, and in the meantime, I give them a valid lien in said amount pursuant to sec. 757.36, Wis. Stats. In return, CANNON & DUNPHY, S.C. will make every effort, consistent with the Rules of Professional Responsibility to provide me with all reasonable and necessary legal services in connection with the investigation and prosecution of my claim. Additionally, CANNON & DUNPHY, S.C. hereby agrees to advance reasonable and necessary costs, expenses and disbursements for the prosecution of my claim which I will repay in addition to the legal fees. I understand that there will be no charge for services nor reimbursement for costs, expenses or disbursements advanced unless there is a recovery on my claim.

I have been advised that services could be rendered on an hourly basis, but I hereby elect to be bound by the contingent fee contract.

I have been advised that at any time during the handling of my case, CANNON & DUNPHY, S.C. may recommend that the case not be continued for good and sufficient reasons, including, but not limited to, little or no likelihood of success on the claim's merits or a lack of available funds to satisfy the claim should it be successful. In the event they make such a recommendation to discontinue which I reject, I hereby agree that they may withdraw as my attorneys in consideration of their agreement to give me due notice of their withdrawal. CANNON & DUNPHY, S.C. agrees that they will comply with all the applicable provisions of the Code of Professional Responsibility. I have been advised by CANNON & DUNPHY, S.C. that they will undertake every reasonable effort to bring my claim to a successful conclusion prior to trial. If they negotiate a settlement prior to trial which they recommend I accept, I have the right to reject such recommendation. If I choose to reject their recommendation, then I agree that I will not object to them withdrawing as my attorneys upon their giving due notice and otherwise complying with the Code of Professional Responsibility. In the event CANNON & DUNPHY, S.C. withdraw as my attorneys after I have received a settlement offer which I reject, then I give them a valid lien in the amount of the settlement offer on the date of withdrawal or such lower amount as may be required by the Code of Professional Responsibility.

As can be seen from this retention/fee-lien contract, which

Cannon & Dunphy drafted, the firm was granted a lien under the following circumstances:

(1) Cannon & Dunphy either settles or gets a favorable judgment on the client's claim; or

(2) Cannon & Dunphy procures a settlement offer that is presented to the client and the client rejects the settlement offer, and Cannon & Dunphy then, as a result of that rejection, withdraws as the client's lawyers.

None of these things happened in any of the cases. Although Cannon & Dunphy might *wish* it had drafted its form retention/fee-lien contracts to secure a fee-lien if the client leaves the firm before settlement, it did not do so.

¶ 37 Cannon & Dunphy is a Wisconsin firm with a superb reputation for legal acumen, and all ambiguities in the contract it wrote must be interpreted against it and in favor of its clients (none of whom, insofar as the Record reveals, is a lawyer). *See DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship,* 2004 WI 92, ¶ 66, 273 Wis.2d 577, 605-606, 682 N.W.2d 839, 853-854. But Cannon & Dunphy's retention/fee-lien contract is *not* ambiguous-it plainly does not provide for its survival under the circumstances. Thus, no "interpretation" is necessary. *See McBride,* 176 Wis.2d at 391, 500 N.W.2d at 390 (fee-lien agreement must "still be in force at the time the settlement is procured."). Accordingly, I respectfully dissent from the Majority's conclusion that Cannon & Dunphy has valid statute-based contractual liens in these cases.

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

JEANETT MARKWARDT and
GEORGE MARKWARDT,
Plaintiffs, Case No. 03-CV-008352
Case Code: 30107

v.

CANNON & DUNPHY, S.C.,
Third-Party Intervener.

ORDER RE MAY 16, 2005 MOTIONS

Various motions of plaintiffs, Jeanett Markwardt and George Markwardt, and of third-party intervener, Cannon & Dunphy; S.C.; having come on to be heard before the Honorable Christopher Foley in his courtroom in the Milwaukee County Courthouse on May 16, 2005,

And the court having considered the written submissions of the parties and having beard oral argument an behalf of the moving parties,

And the court having issued an oral decision and order from the bench granting and denying such motions as the court deemed appropriate to address,

Now, therefore, on motion of the parties and pursuant to the oral decision and order of May 16, 2005,

IT IS ORDERED:

1. Plaintiffs motion for consolidation of this action

with an action pending in the circuit court for Waukesha County, Case No.: 04-CV-2587 be, and is hereby, denied.

2. Cannon & Dunphy, S.C. has a valid lien under Chapter 757 of the Wisconsin Statutes relating to the attorney's fees in the above-entitled matter to the extent of eighty percent (80%) of the total fees earned herein.

3. The court having been advised that 80% of the total fees earned in this matter in the total amount of $29,166.67, having been deposited with the clerk of courts for Waukesha County, such fees in the total amount of $23,333.33 shall be paid by a check payable to Cannon & Dunphy, S.C., to be forwarded to Terry E. Johnson of Peterson, Johnson & Murray, S.C. by the clerk forthwith.

Dated at Milwaukee, Wisconsin this 1st day of July, 2005.

BY THE COURT:
CHRISTOPHER R. FOLEY BR. 14
Honorable Christopher R. Foley
Circuit Court Judge

STATE OF WISCONSIN: CIRCUIT COURT:
MILWAUKEE COUNTY
CIVIL DIVISION

PAMELA D. DRASKOVICH,
Plaintiff,

Case No. 04-CV-000737

v.

Personal Injury-Auto: 30101

CANNON & DUNPHY, S.C.,
Proposed Third-Party Intervener.

ORDER

This matter before the Court for Cannon & Dunphy, S.C.'s Motion to Reopen and Intervene to Enforce Attorney's Lien, and Motion to Strike and for Sanctions, on May 27, 2005, James J. Gende II, appealing on behalf of the plaintiffs, Robert E. Barnes appearing special and limited on behalf of James J. Gende, II, Terry E. Johnson, on behalf of Cannon & Dunphy, S.C., the Court having reviewed all of the extensive pleadings, it is HEREBY ORDERED,

1. That Cannon & Dunphy, S.C.'s Motion to Reopen and Intervene to Assert a Lien for Fees and for Five Percent Interest is DENIED.

2. That Cannon & Dunphy, S.C.'s Motion to Strike and for Sanctions is DENIED.

6-14-05
Date

s/
The Hon. Clare L. Fiorenza
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT
BRANCH 3 MILWAUKEE COUNTY

PAMELA DRASKOVICH,
Plaintiff,
and Case No. 04CV000737
UNITED HEALTHCARE OF WISCONSIN,
And AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Involuntary Plaintiffs,
v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and KRISTIN MCCAULEY,
Defendants.

DECISION AND ORDER

Upon review of the affidavits submitted by the parties, and upon further consideration of the additional facts brought to light in this matter, Cannon & Dunphy's (C&D's) Motion for Reconsideration is GRANTED.

The Court originally denies C&D's Motion to Intervene based on its belief that the motion was not made in a timely manner. The Court applies a two-part test to determine if the motion to intervene was timely. First, whether in light of all of the surrounding circumstances, the movant acted promptly. Second, whether intervention will prejudice the original parties to the action. *Bilder v. Township of Delavan*, 112 Wis.2d 539, 334 N.W.2d 252 (1983).

To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or established

a manifest error of law oı fact. *Koepsell's Olde Popcorn Wagons. Ltd.*, 275 W is2d 397, 685 N.W.2d 853, 862 (2004), *quoting Oto v. Metro Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000).

When the Court first decided C&D's Motion to Intervene in May 2005, it was not clear that before the fall of 2004, the parties were only disputing the litigation costs, not the attorneys fees. Thud, C&D was not aware before that time that it would need to intervene in all of Attorney Gende's pending C&D cases in order to protect its attorneys lien.

C & D also brought it to the Court's attention that it had obtained a hearing date for its Motion to Intervene in January of 2005, before the case was dismissed. That hearing was scheduled to take place March 21, 2005. On February 15, 2005, this case was dismissed after Pamela Draskovich settled her underlying personal injury suit against the defendants. The Court was unaware that the issue of attorney fees and costs remained an issue in this case. When the case was dismissed, the March 21, 2005 motion date was removed from the Court's calendar. The Court was advised that at the time the motion was vacated, C&D had not filed any papers on its motion because there was enough time remaining before the motion to do so. On February 25, 2005, C&D rescheduled the motion date for May 20, 2005.

The Court is satisfied that considering all of the surrounding circumstances, along with the facts brought to light by this Motion to Reconsider, C&D's Motion to Intervene and Reopen was not untimely as to prevent this court from granting its request.

Accordingly, IT IS HEREBY ORDERED as follows:

1. C&D's Motion for Reconsideration is GRANTED.
2. C&D'S Motion to Intervene and Reopen the case is

GRANTED.

3. Attorney Gende shall disburse the settlement money in this case in accordance with the Separation Agreement as follows:

    a. Fees: 80% or $12,000.00 to C&D.
    b. Costs: $2,278.01 to C&D

4. Payment shall be made within thirty (30) days of the date of this Order.

Dated at Milwaukee, this 20th day of September, 2005

BY 'THE COURT

s/

Clare L. Fiorenza
Court Judge, Branch 3

STATE OF WISCONSIN

CIRCUIT COURT
MILWAUKEE COUNTY
CIVIL DIVISION

LORI A. TUCEK,
Plaintiff,

MANAGED HEALTH SERVICES INSURANCE CORP., a Wisconsin insurance corporation
Involuntary Plaintiff, Case No. 04-CV-2876

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign insurance corporation, and EDNA M. NORTH,
Defendants,

and

CANNON & DUNPHY, S.C.,
Intervenor.

ORDER RE MOTIONS RE CANNON & DUNPHY, S.C. CLAIM FOR FEES AND COSTS

The motions of plaintiff, Lori A. Tucek, and of proposed intervenor, Cannon & Dunphy, S.C., relating to the claim for fees and costs advanced by Cannon & Dunphy, S.C., having come on to be heard before the Honorable Michael E. Guolee, Circuit Court Judge, in his courtroom in the Milwaukee County Courthouse on June 20, 2005:

And plaintiff and proposed intervenor having appeared by their attorneys, and the Court having considered the written submissions of the parties, having heard the oral arguments of

counsel, and otherwise being duly advised in the premises,

And the Court having issued an oral decision and order from the bench on June 20, 2005,

Now, therefore, pursuant to the previously filed motions of the parties and to the oral decision and order of June 20, 2005,

IT IS ORDERED:

1. Plaintiff's motion for substitution be, and is hereby, denied as untimely filed.

2. Plaintiff's request for an evidentiary hearing on the attorney's fees and cost issue be, and is hereby, denied.

3. Plaintiff's motion to consolidate this action with another action pending in Waukesha County be, and is hereby, denied for the reasons set forth on the record on June 20, 2005.

4. The motions of Cannon & Dunphy, S.C., to reopen this action and for leave to intervene to pursue its claim for attorney's fees and costs be, and are hereby, granted for the reasons stated on the record on June 20, 2005.

5. The Court having determined that the claimed attorney's fees and costs are reasonable, the motion of Cannon & Dunphy, S.C., for an order directing the payment of attorney's fees in the total amount of $12,466.66 and costs in the amount of $1,206.79, comprising the total amount of $13,

673.45, be, and is hereby, granted for the reasons set forth in the record on June 20, 2005. The Clerk for Circuit Court for Waukesha County is directed to make that payment forthwith by a check payable to Cannon & Dunphy, S.C., to be delivered to its attorney, Terry E. Johnson.

6. The motion of Cannon & Dunphy, S.C., for the assessment of statutory interest be, and is hereby, denied subject to the right of Cannon & Dunphy, S.C., to pursue a claim for interest in any subsequent proceedings in other litigation.

Dated at Milwaukee, Wisconsin this 29 day of June, 2005

BY THE COURT:
s/_____
The Honorable Michael D. Guolee
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT
MILWAUKEE COUNTY

EVELYN RODRIGUEZ,
Plaintiff,
and

MOTOROLA, INC.,
a foreign corporation,
Involuntary Plaintiff,
v.

Case No. 03-CV-003470
Case Code: 30101

ALLSTATE INSURANCE COMPANY,
a foreign insurance company, and
JENNIE A NAGODE,
Defendants,
and

CANNON & MURPHY, S.C.,
Intervenor.

ORDER RE MOTION TO INTERVENE

The motion of-Cannon & Dunphy; S.C., to reopen, to intervene, and to obtain additional relief concerning attorney's fees and costs having come onto be heard before the Honorable Michael D. Goulee, Circuit Court Judge, in his court in the Milwaukee County Courthouse on April 11, 2005,

And James J. Gende II having appeared personally and by his attorney, Robert E. Barnes, and Cannon & Dunphy, S.C., having appeared by Terry E. Johnson, and defendants having appeared by one of their attorneys,

And the court having considered some of the written submissions of the parties, having heard the oral statements of counsel, being duly advised on the premises, and having further issued an oral decision and order from the bench,

NOW, THEREFORE, on motion of Cannon & Dunphy, S.C., and pursuant to the oral decision and order of April 11, 2005,

IT IS ORDERED:

1. The submissions made during the week of April 8 be, and are hereby, disregarded as not having been submitted in compliance with the local rules.

2. The court having determined that it has jurisdiction over the issue concerning attorney's fees and costs proposed to be raised by the intervenor, the motion of proposed intervenor, Cannon & Dunphy, S.C., to reopen this action be, and is hereby, granted solely for the purpose of addressing the question of the proper division and payment of attorney's fees and costs.

3. The motion of proposed intervenor, Cannon & Dunphy, S.C., for leave to intervene in this action for the purpose of addressing the questions of attorney's fees and costs be, and is hereby, granted.

4. The motion of Cannon & Dunphy, S.C., for payment and disbursement of the attorney's fees and costs in accordance with the separation agreement be, and is hereby, granted.

5. The court having determined that the costs claimed by Cannon & Dunphy, S. C., are reasonable and proper, Cannon & Dunphy, S.C., be, and is hereby, awarded its

total claimed costs in the total amount of $2,046.49. That amount should be paid by the Clerk of Courts for Waukesha County by a check payable to The Trust Account of Peterson, Johnson & Murray, S.C. forthwith.

6. The court having determined that the attorney's fees shall be paid in accordance with the separation agreement entered into by the parties, the total attorney's fees of $8,333.33 shall be paid forthwith by the Clerk of Courts for Waukesha County by a check payable to The Trust Account of Peterson, Johnson & Murray, S.C. Upon receipt and deposit of that check and clearing of the check through ordinary bank procedures, 80% of the funds so paid shall be distributed according to the seperation contract between Cannon & Dunphy, S.C., and Gende Law Offices and/or James J. Gende II as Mr. Gende may direct.

Dated at Milwaukee, Wisconsin, this 28 day of April, 2005.

BY THE COURT:
s/ Michael D. Guolee
Hon. Michael D. Goulee,
Circuit Court Judge

Gende Separation Agreement

Pursuant to the terms and conditions set forth below, Cannon & Dunphy, S.C. and James J. Gende II hereby agree as follows:

1. Definitions: Employee is defined as James J. Gende II. Employer is defined as Cannon & Dunphy, S.C.

2. Employment Agreement: Employee acknowledges and admits that the current employment agreement dated 9/12/00 is fair and all of its terms are valid and binding. Employee agrees not to initiate a challenge, in any forum, as to the validity of said agreement.

3. Representations: Employee represents and warrants that he has fulfilled all of the terms of the employment agreement dated 9/12/00 and has not breached or violated any fiduciary duties owed to Cannon & Dunphy, S.C. or clients of Cannon & Dunphy, S.C. Employee further represents and warrants that no person or entity has contacted Employee, directly or indirectly, regarding representation that he has not disclosed in writing to Cannon & Dunphy, S.C. Cannon & Dunphy, S.C. has no information at this time to indicate these representations are untrue.

4. Retainer Agreements: Employee acknowledges the current retainer agreements and liens are valid and binding on all clients of Cannon & Dunphy, S.C. and shall not be modified.

5. Separation-Agreement Terms: Based on the foregoing representations and warranties, and in consideration of same, Employer agrees to modify paragraph 12 of the current employment agreement dated 9/12/00 in the following limited respects. All other terms not expressly modified shall remain in full force and effect:

   a. Employee's compensation on cases where the client

elects to have Employee represent client shall be, after payment of any referral fees due, 20% of the fees recovered to Employee with the remaining 80% of the fees paid to Cannon & Dunphy, S.C.

(1) The Roger Wurster case venued in Illinois shall have a fee split of 75% to Employer and 25% to Employee after payment of any referral fee.

b. If the client case is successfully concluded, the payments of costs shall be paid to Cannon & Dunphy, S.C. out of the recovered monies pursuant to the Cannon & Dunphy, S.C. retainer agreement. If the case is not successfully concluded, Employee, at the conclusion of the client case, shall remain personally liable and shall pay all costs incurred at Cannon & Dunphy, S.C. on the client case to Employer within 14 days of conclusion of the client matter. Employee agrees that he will consult with Employer prior to settlement and/or trial, discuss the costs incurred, valuation of case and any offer, and Employer agrees to consider waiving paragraph 5(b) herein on a case-by-case basis in light of the information conveyed by Employee.

c. Employee shall be paid his regular salary through April 30, 2004.

6. Confidentiality: The terms of this agreement shall remain confidential and shall not be disclosed to anyone absent application to a court with 30 days written notice of such application to Employer and said court's written order, for good cause shown. If there is any violation by Employee of the terms of this Separation Agreement, Employee acknowledges and legally agrees that the modifications to the original employment agreement dated 9/12/00 are null and void and that Employee agrees to be bound by the terms of

the entire employment agreement dated 9/12/00. Employee further agrees not to initiate a challenge, in any forum, as to the validity of the employment agreement.

7. Release: For valuable consideration, Employee hereby releases, acquits and forever discharges Employer from any and all claims, actions, causes of action, contracts, lawsuits, demands, damages, injuries, costs, interest, judgment and compensation, whether known or unknown from the beginning of time to the date of execution of this agreement. However, this paragraph is null and void only if Cannon & Dunphy, S.C. initiates any cause of action against Employee in any forum.

8. Client Letter: Employer agrees that a mutually agreeable client letter (Exhibit A hereto) will be forwarded to all clients assigned to Employee on Employee's last day of employment at Cannon & Dunphy, S.C.

Dated at Brookfield, Wisconsin this 6th day of April 2004.

s/ 4-8-04	s/
Employee: James J. Gende II	Employer: Cannon & Dunphy S.C.

The purpose of this letter is to notify you that Attorney James Gende has decided to voluntarily leave Cannon & Dunphy and practice on his own. We all wish him well and success in his new business.

Cannon & Dunphy will gladly continue to represent you pursuant to the retainer contract you signed with our firm and will use the full resources we have available. If you choose to keep your case with Cannon & Dunphy, we will reassign your case to another attorney in the firm. That attorney will have you in immediately to discuss your file in detail and answer any questions you might have.

We want to advise you that you are free to have Attorney Gende represent you from his new office. If that is your choice, we will need a written directive from you to turn your file over to him.

You have a third option of seeking counsel with another firm. If that is your choice, then we will need a written directive to turn your file over to the new firm, as well as the name and address of the firm.

If you elect to go elsewhere, you should know that because Cannon & Dunphy have expended time and money in advancing your case, the firm does have the right under Wisconsin law to assert a claim against your ultimate recovery for its costs and attorney's fees pursuant to the original retainer contract you signed with Cannon & Dunphy.

We can assure you that the transition will be a smooth one and will not prejudice your case in any way whatever your choice may be.

If you have any questions, please call William Cannon at (262) 796-3700 or Patrick Dunphy at (262) 796-3701. We will be happy to address any concerns or questions you may have. If you would like to call Attorney Gende at his new office, you can reach him at 262-893-5683.

Sincerely,

CANNON & DUNPHY, S.C.

William M. Cannon

Patrick O. Dunphy

EXHIBIT A

EMPLOYMENT AGREEMENT

THIS AGREEMENT, made as of the 15th day of May, 2000, by and between James J. Gende, an attorney duly licensed to practice law in the State of Wisconsin ("Employee"), and CANNON & DUNPHY, S.C., a Wisconsin corporation organized under the Wisconsin Service Corporation Law (the "Corporation").

RECITALS:

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the parties hereto agree as follows:

1. EMPLOYMENT. The Corporation hereby employs the Employee as an attorney, and the Employee hereby accepts such employment upon the terms and conditions hereinafter set forth.

2. PERFORMANCE AND DUTIES. Employee agrees to devote his full professional time and effort to the performance of his duties as an attorney hereunder and to do so in accordance with the general policies and standards of performance established by the Corporation from time to time while the contract is in force. Without the written consent of the Corporation, the Employee shall not accept any other professional office or duties, public or private, with or without compensation, which would interfere or be inconsistent with his duties hereunder. Except as may be otherwise authorized by the Board of Directors of the Corporation by appropriate corporate action, all remuneration for professional services of the Employee in whatever capacity (including without limitation, compensation from professional magazines and pamphlets and fees and honoraria for speeches and teaching engagements) shall be deemed income of the Corporation and

shall be paid to or turned over to it upon receipt by the Employee. In carrying out his duties under this Agreement, the Employee shall not violate any rules prescribed by the ethics of his profession or by any federal, state or municipal statute. The Employee shall not, while this contract is in force, engage in the practice of law or related professional activities except in the performance of his duties under this contract. The foregoing shall not be construed as preventing the Employee from entering into business ventures not constituting the practice of law or from making investments of his assets. The Employee recognizes that the Corporation shall have complete authority with regard to the acceptance of clients by the Corporation and the Corporation shall have complete authority with regard to the establishment of the appropriate fee for professional services. The Corporation shall direct and control the assignment of clients to the Employee in a manner consistent with the best interest of the clients and the Corporation and the requirements of the Rules of Professional Conduct for Attorneys. The Employee agrees to render services to such clients as are assigned to him by the Corporation. The Employee recognizes that the clients assigned to him may subsequently be assigned to other employees. Employee acknowledges that all clients assigned to him are clients of the law firm of the Corporation and are not the clients of the Employee. All fees generated on such client cases assigned to the Employee are the property of the Corporation regardless of when the fees are generated, or whether the Employee is still employed by the Corporation when the fees are generated.

3. TERM. The term of this Agreement shall be deemed to have commenced on May 15, 2000, and shall continue indefinitely until terminated by either party upon thirty (30) days prior written notice to the other party. This Agreement may be terminated by either party at any time for cause and shall automatically terminate upon the death of the

Employee, his disqualification as an attorney, or disqualification to practice law in the State of Wisconsin. The Employee shall be deemed to have been terminated for cause if the basis of such termination is:

A. Criminal misconduct on the part of the Employee;

B. A material violation by the Employee of the Canons of Ethics;

C. Suspension of the Employee's license to practice law in the State of Wisconsin;

D. Failure to perform work in a competent and timely manner; or

E. Failure to follow directives and procedures from the Board of Directors or the Corporation.

4. FACILITIES AND EXPENSES. The Corporation shall supply or cause to be supplied office facilities, and in connection therewith, the equipment, office supplies, clerical and other assistance necessary to enable the Employee to carry out his duties hereunder and deemed necessary by the Corporation. The Corporation shall carry professional liability insurance for the Employee with such coverage and deductible features as it may determine.

5. COMPENSATION. For all services to be rendered by the Employee under this Agreement or for any other duties assigned him by the Corporation, the Employee shall receive the following compensation:

A. A base salary of Fifty-Five Thousand and No/100 Dollars ($55,000.00) per annum, payable in equal semi-monthly installments of Two Thousand Two Hundred Ninety-One and 67/100 Dollars ($2,291.67) on the fifteenth and thirtieth day of each month during the Contract Year. For each subsequent Contract Year, the base salary shall be payable in twenty-four (24) equal semi-monthly installments during the Contract Year

B. In addition to the base salary set forth in Paragraph (A) above, the Employee, unless terminated for cause shall be entitled to a bonus each full Contract Year in an amount of not less than $20, 000.00. The bonus owing hereunder shall be payable on December 31 of each Contract Year except that a bonus shall be paid to employee in the amount of $10,000.00 on or before August 1, 2000. In the event of a termination of employment, for any reason, no bonus shall be owed or payable to the employee.

C. Limitations. Any bonus owed to the employee shall be subject to the Corporation having available cash funds to pay same prior to any distribution of wages and bonuses to William M. Cannon and Patrick O. Dunphy. If the Board of Directors of the Corporation determines, in its sole discretion, that timely payment of any bonus as set forth above to Employee would make the Corporation financially unstable or insolvent, taking into consideration overhead costs, reasonably anticipated operating expenses, reasonable reserves for capital expenditures or other appropriate financial considerations, the obligation to pay any bonus shall be tolled until the Corporation can make such payment and remain financially stable. Any income not timely paid pursuant to paragraphs A and B shall remain a liability on the books and records of the Corporation and the income owed shall continue to accrue as a liability of the Corporation to Employee until such time as the Corporation is able to make said payments from available cash in the sole discretion of the Board of Directors of the Corporation.

5. REFERRAL FEES AND CONTINGENCY FEES. All referral fees agreed to by the Employee must be approved by the Board of Directors of the Corporation in writing if they deviate from the standards of 80/20 in medical malpractice, product liability, corporate or business litigation and premises liability, and 75/25 in automobile accident cases. The standard

contingency fee in automobile accident or premises liability cases is one-third (1/3). The standard contingency fee in product, corporate, or business litigation is forty percent (4090. The standard contingency in medical malpractice cases is set by Chapter 655. If Employee fails to obtain written approval in advance of entering into agreements with referring counsel in deviation of the above rules, then the difference between the referral amount paid by the Corporation and what should have been paid pursuant to the above rules will be subtracted from any amount owed to the Employee under paragraph 5.

6. DEATH. In the event of the Employee's death during the term of this Agreement, the Employee's employment hereunder shall terminate immediately, and the Employee's estate shall be entitled to receive the base salary due the Employee up to the date of hi& death, plus any pro rata bonus to which the Employee would have been entitled.

7. SICK PAY. In the event that the Employee is unable to perform his duties hereunder by reason of illness or accident, he shall continue to receive his full base salary for the first thirty (30) calendar days of such incapacity in any elapsed period of twelve (12) months and no base salary thereafter.

8. VACATIONS. The Employee shall be entitled to a minimum of two (2) weeks (ten (10) working days) vacation for each Contract Year (after the first six months of employment) or such greater length of time as may be approved from time to time by the Board of Directors. The time of such vacation shall be subject to approval by the Corporation. The Employee shall not be entitled to receive any additional compensation from the Corporation on account of his failure to take vacations nor shall he be entitled to accumulate unused vacation time or sick time from one year to the next. The Employee shall also be entitled, without loss

of pay, to absent himself voluntarily from the performance of his employment with the Corporation for such additional period of time and for such valid and legitimate reasons as the Board of Directors in its discretion may determine. In addition thereto and without loss of pay, the Employee shall be entitled to absent himself from the practice during each Contract Year to attend seminars or continuing legal education courses as approved by the Board of Directors in their discretion.

9. BENEFITS. The Employee, upon satisfaction of the eligibility criteria, shall be entitled to participate in all benefits and 401(k) programs which the Corporation may provide from time to time for its employees. The Corporation shall make available health insurance to the Employee subject to eligibility and co-pay rules (as the Board of Directors in its discretion shall determine), shall pay all professional society dues for the Employee and shall supply free office parking to the Employee. In addition thereto, the Corporation shall pay the registration fee of the Employee for in-state meetings and seminars. Unless the Corporation expressly agrees otherwise, the Employee, at his own expense, shall be responsible for all other items of reasonable professional expenses incurred by the Employee in the interest of his practice with the Corporation, including entertainment expenses, disability insurance, the cost of attendance of meetings and seminars (excluding the in-state registration fees) and automobile expenses; provided, however, that the Corporation will reimburse the Employee for any entertainment expenses or business expenses incurred by the Employee at the request of and for the benefit of the Corporation.

10. EFFECT OF WAIVER. The waiver by either party of a breach of any provision of this Agreement shall not operate as or be construed as a waiver of any subsequent breach thereof.

11. NOTICES. Any and all notices required or

permitted to be given under this Agreement shall be sufficient if furnished in writing, sent, by certified mail, to his last known address in the case of the Employee or to its principal office in Brookfield, Wisconsin, in the case of the Corporation.

12. FILES, RECORDS AND CLIENTS. All files, records, and other information concerning clients of the Corporation shall belong to and remain the property of the Corporation; provided, however, that upon termination of employment, the Employee, with the written consent and at the direction of the client, shall have the right to reproduce, at his own expense, any of such clients' records. Employee agrees to pay customary copying charges of the corporation in advance of receipt of client records. Employee agrees to pay the Corporation the customary copying charges of the Corporation to enable the Corporation to retain a copy of the client records. Said copying charges shall be paid to the Corporation prior to the release of any client records.

In the event that the client elects to have the Employee represent him rather than the Corporation, the departing Employee shall pay to the Corporation by certified check the total amount of costs incurred to the date of departure on each client case where the client elects to have the departing Employee represent the interests of that client. Employee admits and acknowledges that the foregoing allocation is fair and equitable and that in computing the Corporation's share, consideration was given to the efforts, advertising, marketing, development of business, technology expenditures, work of the Corporation, the risk assumed by the Corporation regarding the advancement of costs and the reputation of the Corporation and the effect of such reputation on the generation of business. At the conclusion of the case and if a recovery is received, the fee owing shall be computed on the gross recovery and the fee and costs received shall be paid as follows:

A. Employee shall be entitled to that portion of the fee equal to the hours the employee spent on the case after termination of employment with the Corporation hereunder, multiplied by the hourly rate set forth in the base salary with the Corporation contained in paragraph 5a in the this agreement, herein, divided by 2080 hours.

B. The Corporation shall be reimbursed forthwith for all costs advanced by the Corporation on behalf of the client; and

C. The Employee shall be reimbursed for all costs advanced by the Employee on behalf of the client.

Any amount owing hereunder to the Corporation shall be paid by the Employee on or before the tenth (10th) day of the month for funds received in the prior month. The Employee agrees to give a report quarterly to the Corporation detailing the status of all cases which are subject to the provisions of this paragraph. Any payments owed by the Employee shall be accompanied by a copy of a Settlement Statement, check and other reasonable documentation supporting the terms of such settlement. In addition thereto, as to cases subject to (A) above, the Employee shall submit detailed time records supporting the hours for which compensation is claimed. The parties agree that the Corporation shall have the right to inspect all documents relating to the settlement of any such case to verify the correctness of the amount paid to it by the Employee. In the event that the Employee fails to make any payments owing hereunder, the Corporation shall have the right to offset such amount against any amount owing the Employee pursuant to Paragraph 5 above in addition to all other remedies available to the corporation including, but not limited to, commencement of a lawuit.

13. PRIOR AGREEMENT. The terms and conditions set forth herein supersede any prior Employment Agreement, if any, between the parties and upon execution of the

Employment Agreement, the prior agreement, if any, shall be null and void.

14. BINDING EFFECT. This Agreement shall be binding upon the parties hereto and shall inure to the benefit of the successors and assigns the Corporation and to the estate, heirs and personal representatives of the Employee.

15. CONFIDENTIALITY: In the event of termination of employment for any reason, Employee agrees to the following:

A. Employee agrees that all lists of clients and computer reports shall remain confidential and will not be reproduced by Employee at any time or disseminated to anyone.

B. Employee agrees that all computer data, screens, reports, telephone software, and all other software are trade secret and business privileges of the Corporation and shall not be revealed to anyone, copied, substantially duplicated or used by Employee.

C. Employee agrees that all marketing, advertising and solicitation documents and information shall not be copied, used or substantially duplicated by Employee.

D. Employee agrees not to employ, solicit, contact, or cause any Employee to leave employment with the Corporation. Employee agrees to pay, as damages to the Corporation, double the annual salary of said departing employee, if Employee employs any employee of the Corporation.

E. After termination, Employee agrees to not contact, employ or use any independent contractors used by the Corporation.

F. Employee agrees that all office policies and procedures are confidential. Employee agrees to not take any rules, policies, procedures, forms or work-product with

him or recreate them.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first written above.

Date: _____ CANNON & DUNPHY, S. C.

By: _____
President

Date: _____ _____
James J. Gende